No. 11919

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

O'KEEFE AND MERRITT MANUFACTURING COMPANY AND L. G. MITCHELL, W. J. O'KEEFE, MARION JENKS, LEWIS M. BOYLE, ROBERT J. MERRITT, ROBERT J. MERRITT, JR., AND WILBUR G. DURANT, INDIVIDUALLY AND AS CO-PARTNERS, DOING BUSINESS AS PIONEER ELECTRIC COMPANY, RESPONDENTS

AND

UNITED STEELWORKERS OF AMERICA, STOVE DIVISION, LOCAL 1981, C. I. O., and PHILIP MURRAY, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED STEELWORKERS OF AMERICA, C. I. O., INTERVENORS

ON PETITION FOR ENFORCEMENT WITH MODIFICATIONS OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board (R. I., 195–205),[1]

[1] "R" refers to the printed transcript of record. The roman numerals preceding the comma refer to the volume of the printed record in which the reference appears. The arabic numerals following the comma refer to the pages of the volume of the printed record in which the reference appears.

pursuant to Section 10 (e) of the National Labor Relations Act, as amended, herein called the Act, as amended (61 Stat. 136, 29 U. S. C., Supp. I, Secs. 141, *et seq.*), for enforcement with modifications of its order issued against respondents on August 26, 1946, following the usual proceedings under Section 10 of the National Labor Relations Act, herein called the Act (49 Stat. 449, 29 U. S. C., Secs. 151, *et seq.*). Respondents are the O'Keefe and Merritt Manufacturing Company, herein called the corporation, and L. G. Mitchell, W. J. O'Keefe, Marion Jenks, Lewis M. Boyle, Robert J. Merritt, Robert J. Merritt, Jr., and Wilbur G. Durant, individually and as co-partners, doing business as Pioneer Electric Company, herein called the partnership, all of whom are herein sometimes collectively called respondents. The labor organizations involved in this proceeding are: United Steelworkers of America, Stove Division, Local 1981, C. I. O., herein called the C. I. O.; Stove Mounters International Union, Local 125, A. F. L., herein called the Stove Mounters; International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 389, A. F. L., herein called the Teamsters; International Moulders & Foundry Workers Union of North America, Local No. 374, A. F. L., herein called the Moulders; International Association of Machinists, District Lodge 94, Local 311, herein called the I. A. M.; Brotherhood of Painters, Decorators and Paperhangers of America, Local 792, A. F. L., herein called the Painters; and Los Angeles County District Council of Carpenters, United

Brotherhood of Carpenters and Joiners of America, A. F. L., herein called the Carpenters. With the exception of the first enumerated labor organization, which is a C. I. O. affiliate, the remaining labor organizations are herein collectively called the A. F. L.[2] The jurisdiction of this Court is based upon Section 10 (e) of the Act, as amended, the unfair labor practices having occurred at respondents' plant in Los Angeles, California.[3] On August 5, 1948, pursuant to their motion to intervene "for the purpose of urging that Section 9 (h) of the Act, as amended, is illegal, unconstitutional and void" (R. IV, 1777, 1764–1777), this Court entered an order permitting the intervention in this proceeding of United Steelworkers of America, Stove Division, Local 1981, C. I. O., and Philip Murray, individually and as president of the United Steelworkers of America, C. I. O. (R. IV, 1778). The Board's decision and order (R. I, 174–190, 61–119) are reported in 70 N. L. R. B. 771.

STATEMENT OF THE CASE

I. The Board's findings of fact

The course of the unfair labor practices in this case, initiated by the corporation and ultimately joined in

[2] Although the I. A. M., included in this group, is not presently an affiliate of the American Federation of Labor, in the interest of convenience, and for reasons which appear *infra*, p. 65, n. 38, reference to the A. F. L. includes the I. A. M.

[3] In the conduct of their business, more particularly described *infra*, pp. 4–6, 21–26, respondents make substantial sales in interstate commerce (R. I., 69–72; R. III, 1056, 1268). Jurisdiction is not contested (*ibid.*, R. I., 321).

by the partnership, was designed to prevent their employees from selecting and bargaining through the C. I. O. as their exclusive representative and, against the employees' will, to establish the A. F. L. as their bargaining representative. The specific shape which these unfair labor practices took may best be understood in relation to certain antecedent events.

A. The background

1. The business of the corporation and the partnership

Chartered in 1920 as a California corporation (R. I, 70; R. IV, 1717–1722),[4] the corporation was thereafter continuously engaged at its plant in Los Angeles, California, in the business of manufacturing and selling gas stoves, other gas appliances, and electric refrigerators until December 7, 1941 (R. I, 70; R. III, 1055–1056, 1351). Thereafter, with the advent of the war, it was exclusively engaged as a prime contractor in the manufacture of electrical generator sets and ammunition for the military services of the United States Government (R. I, 70; R. III, 1056, 1060, 1351–1353).

In 1942, at the suggestion of W. G. Durant, the corporation's chief engineer, to Daniel P. O'Keefe, the corporation's president, in order to eliminate extensive subcontracting and to effect economies in operation, it was decided to set up a partnership to handle certain electrical wiring incident to the manufacture of the generators for the military services (R. I, 71; R. III, 1140, 1197–1198, R. IV, 1447–1449).

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[4] Where, in a series of references, a semicolon appears, the references preceding the semicolon are to the Board's findings, succeeding references are to the supporting evidence.

On August 15, 1942, the partnership was formed, composed of three individuals, two of whom were officers and directors in the corporation and all of whom were stockholders in the corporation (R. I, 71, 72, n. 7; R. IV, 1703–1706, 1738–1743).[5] On November 16, 1942, the corporation leased to the partnership part of its premises, about twelve thousand square feet of enclosed floor space, for a term of one year, at a monthly rental of five hundred dollars, in which the partnership conducted its operations (R. I, 71; R. III, 1064–1065). After the expiration of the term of the lease, the partnership continued in occupancy on the same conditions (R. III, 1215).

About August 14, 1945, V-J day, the Government terminated 70 percent of its outstanding contracts with the corporation, and within a month practically all of the remaining contracts were terminated (R. IV, 1453). The partnership's activities were correspondingly sharply curtailed, and within two months, its production and maintenance force, which on V-J day amounted to one hundred eighty employees, rapidly dwindled to fifteen employees (R. I, 71; R. IV, 1453–1454, R. III, 1144–1146). The corporation, with its approximately 350 production and mainte-

[5] The membership of the partnership consisted of Robert J. Merritt who was secretary-treasurer and director of the corporation, and owned 12.5 percent of its shares (R. I. 70–71; R. III, 1048–1049, 1124); Willis J. Boyle who was vice-president and director and owned 8.1 percent of its shares (*ibid.*); and Lewis M. Boyle who owned 8.3 percent of the corporation's shares (R. I, 71; R. III, 1125). On January 1, 1944, Robert J. Merritt, Jr., son of Robert J. Merritt (R. III, 1126), was admitted to membership in the partnership (R. I, 71; R. III, 1707–1710). He owned 4 percent of the corporation's shares (R. I, 71; R. III, 1124).

nance employees, undertook reconversion to peacetime production (R. I, 180; R. III, 1353–1356; R. II, 668).

2. The A. F. L.'s drive to organize the corporation's employees in 1936

In 1936 or 1937, the American Federation of Labor conducted an unsuccessful campaign to organize the corporation's employees (R. I, 73–74; R. II, 645–646; R. IV, 1491, 1515–1517). As part of that campaign, in conjunction with a strike and picketing in 1936, the American Federation of Labor posted the corporation on its unfair list, and has thereafter apparently continued to list the corporation as unfair (R. I. 73–74; R. II, 665–667; R. IV, 1516–1517).

3. The Five and Over Club

The Five and Over Club, organized in 1935 by the president of the corporation, functions primarily as an employee's social and benefit organization (R. I, 77, n. 12; 360, R. IV, 1524–1525). Membership in it is open to all of the corporation's personnel who have five years' service or more (R. I, 77, n. 12; 360, R. IV, 1524). During the 1936 strike, it formed an employee grievance committee, and since then it has been used sporadically, at the suggestion of the president of the corporation, as a means of settling employee grievances (R. I, 77 n. 12; 366, 368, 370, R. II, 649–650, 590–591, R. IV, 1513–1514). Charles Spallino, elected president of the club in January 1945, and previously thereto having served as president for two years and vice president for four years (R. I, 77; R. II, 540–541), described the policy of the Five and Over Club as antiunion (R. III, 1260).

B. The events preceding the consent election

In September 1945, the C. I. O. began an organizational campaign among the corporation's approximately three hundred fifty production and maintenance employees (R. I, 74–75; R. II, 746–747, R. III, 1226). The A. F. L. undertook a rival campaign, and, in order to resolve the disputed question concerning representation thus raised, a consent election agreement was entered into providing for the conduct of an election, to be held on November 20, 1945, to determine whether the corporation's production and maintenance employees desired to be represented by the C. I. O., the A. F. L., or neither (*Infra,* pp. 63–65). The period preceding the consent election was marked by a pervasive effort upon the part of the corporation to assist the A. F. L. in the conduct of its campaign and to secure the defeat of the C. I. O.

1. The corporation enlists two employees to campaign for the A. F. L.

About October 1, 1945, shortly after the inception of the C. I. O.'s organizational campaign, Charles Spallino, the then president of the Five and Over Club, and John Lovasco, another corporation employee, were in the office of Daniel O'Keefe, president of the corporation (R. I, 77–78; 423, R. IV, 1535). In answer to the inquiry by Spallino and Lovasco concerning the position that the Five and Over Club should take in regard to the organizational campaigns of the A. F. L. and the C. I. O., O'Keefe replied that he would prefer not to deal with either union, but that if he had to make a choice, he would favor the

A. F. L. in order that the corporation be stricken from the A. F. L. unfair list, thus removing an obstacle to enlarging the corporation's market for its goods (R. I, 78; 424, R. II, 731, R. IV, 1535–1546). Although disclaiming an intention to dictate the policy of the Five and Over Club, O'Keefe suggested that they speak to Cecil Collins, the corporation's attorney and labor relations advisor, concerning the matter (R. I, 78–79; 424, R. III, 1162–1165, 1167–1168, R. IV, 1566–1567).

Several days later, in accordance with O'Keefe's suggestion, Spallino and Lovasco met with Collins during working hours in Collins' office in the plant (R. I, 79; 371–372). Collins was asked by them "what he knew about the shop going union," and in reply he stated, "We are going to have to go union. Naturally, A. F. L. is what we want. The C. I. O. is a radical organization and we couldn't do business with them" (R. I, 79; 375–376). Collins explained that he had already been in touch with a Mr. Roberts of the A. F. L., and that the procurement of an A. F. L. charter had been arranged (R. I, 376). Affiliation with the A. F. L. would succeed, Collins continued, in removing the corporation from the A. F. L. unfair list, and aid in marketing the corporation's products (R. I, 79; 377, R. II, 734–735). Collins stated that Roberts would shortly meet with Spallino and Lovasco (R. I, 79; 376, 377, 379). Meanwhile, he concluded, Spallino and Lovasco were to go into the plant and sign up 50 members for the A. F. L.: "You get 25 Five and Over members, that is, the latest

members, the new ones. And 25 nonmembers from the plant. Pick the weak ones you can lead * * *" R. I, 378, R. II, 734).

Two or three days later, in accordance with the stated arrangement, Spallino and Lovasco met John Roberts of the Stove Mounters, A. F. L., in the "front office" of the plant (R. I, 380). After telling Roberts that a few employees had already been "signed up" for the A. F. L., the three left the plant and went to Roberts' car where Spallino and Lovasco were given about one hundred Stove Mounters' membership application blanks (R. I, 79; 381–382). They were instructed by Roberts to obtain at least fifty signatures within three or four days in order to set in motion the procedure for obtaining an A. F. L. charter (R. I, 384).

Spallino and Lovasco immediately embarked on their proselytizing duties (R. I, 79; 386–387). Spallino explained his method as follows: "Well, I approached a man and asked him, told him that we had to join the union, and we had to join the A. F. of L., that is the Company wanted the A. F. of L., but at election time they could vote the way they wanted. That is the way I brought it up to them, and they signed—well, I signed about thirty-eight, about thirty-eight or forty, before we met Mr. Roberts again" (R. I, 79; 386). Within a week, Spallino and Lovasco, summoned to the entrance to the plant by a guard, again met Roberts and reported to him the progress in their assignment (R. I, 389–391). Two

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or three days later, Spallino and Lovasco delivered about forty executed membership cards to Roberts in the plant (R. I, 79; 391–397).

Several weeks later, in the latter part of October 1945, Spallino and Lovasco were called to Collins' office where they met representatives of the Stove Mounters, I. A. M., Teamsters, and Carpenters (R. I, 79–80; 440–442). In Collins' presence, the union representatives questioned Spallino concerning the union preferences of the employees in the various departments (R. I, 80; 449–450). Spallino reported that employee sentiment was strongly C. I. O., and advised them to hold an A. F. L. meeting at which the A. F. L. position could be outlined (R. I, 80; 450–451). In response to Spallino's suggestion that he knew of a likely meeting place, Roberts of the Stove Mounters, authorized him to make arrangements to rent the hall (R. I, 80; 451). Within two or three days, as planned, Spallino rented the hall, but despite the distribution of an A. F. L. handbill inviting the employees to the meeting, only thirty employees appeared (R. I, 80; 452, R. II, 485–487). A second meeting was held about a week later (R. I, 80; R. II, 487).

Shortly thereafter, during the first part of November 1945, a meeting was held in Collins' office, attended by Collins, the personnel manager, the plant superintendent, and Charles Spallino and Lovasco (R. II, 488–489). Spallino complained that he "was doing a little too much running around at this campaign for the A. F. of L.," and he thought he "was not really getting anything for all that extra work"

(R. II, 489). He devoted two to three hours per day for one month during working hours in his company-inspired A. F. L. campaigning which carried him to the various plant departments and for which he received his customary salary (R. I, 387, 388, R. II, 541, 543). Collins replied, "If you want to better yourself, you are working with * * * [the plant superintendent] there, he could easily give you a nickel or a ten-cent raise" (R. II, 490). At this time, Collins received a telephone call from John Despol, the C. I. O. representative, who protested the A. F. L. proselytizing which the corporation was countenancing on its time and property (R. II, 752, 490–491). Professing ignorance of the activities which he himself fostered, Collins promised to investigate and to discipline any infractions of the corporation's neutrality (R. II, 490–493, 752–753).

2. The pro-A. F. L. speech delivered by the corporation's president on the day of election

A day or two before the November 20 election, Spallino and Lovasco met with President O'Keefe in his office and submitted to him for approval a pro-A. F. L. document, evidently inspired by Collins, which was to be either reproduced and distributed as a Five and Over Club handbill or to be used as the basis of a speech before the members of the Five and Over Club (R. I, 80–81; R. II, 495–502, 559–564, R. III, 1161–1162). O'Keefe, after considering the contents and suggesting some changes, recommended that the document be abandoned because it would sound too much like a speech emanating from him,

and stated that he would himself deliver a speech to the employees before the election (R. I, 81; R. II, 501, R. III, 1162).

On November 20, 1945, shortly after the corporation's employees returned from lunch, O'Keefe caused all of them to be assembled in the plant and addressed them concerning the election to be held at 4:30 on that afternoon (R. I, 81; R. III, 1208–1209, 1084–1095).[6] O'Keefe disclaimed an intention of "butting in," but asserted that "some of the old timers around here asked me to express my views" (R. III, 1087). He still thought "all unions are bad * * * a lot of them want to make a living without doing any work themselves" (R. I, 81; R. III, 1087). He then said, "But that is not the issue now. The question for you to decide is which of the two, let's say evils, is the lesser. * * *" (R. I, 81; R. III, 1087). He aspersed the sincerity of the C. I. O.'s promises, and questioned their ability to fulfill them (R. III, 1087–1091). He contrasted his version of the C. I. O.'s campaign with what he characterized as the moderateness of the A. F. L.'s representations, stating that "I understand the A. F. of L. had several meetings which were attended by some of you and I have been informed that they promised

[6] Although it was stipulated that the speech was delivered "approximately the 19th of November" (R. II, 504, 507), it is clear that it was actually made on the date of the election. It is not disputed that it preceded by a few hours a speech made by John Lovasco which unquestionably was delivered on the day of the election (R. II, 507–511, R. III, 1028–1029, cf. 1204–1205). The Trial Examiner's finding to that effect, repeated verbatim above, was not excepted to, and is therefore concededly correct.

to get you the going rate in this industry for whatever job you were doing and while this probably did not sound as inticing (sic) as the big promises made by C. I. O., nevertheless it shows that they were honest and playing the game fair with you" (R. III, 1091). He emphasized that the corporation's continued well-being depended on the expansion of its market, which in turn depended on the acceptability of its products to the A. F. L. because most of the installation of domestic appliances in the building trades was performed by A. F. L. workmen (R. I, 81; R. III, 1092). He stressed that because the work of the employees was "closely identified with the building trades" which was predominantly A. F. L., it would be necessary for them if they were to look for work in other plants to be members of the A. F. L. (R. I, 81; R. III, 1092–1093). After making this strong plea for the A. F. L., he concluded by saying "there are three places to vote—one for the C. I. O., one for the A. F. of L., and one for neither. I can just imagine that there are a number of you who would be very glad to vote for neither, but I want to ask you as a favor to pass this up and vote for one or the other" (R. I, 81; R. III, 1094).

3. The pro-A. F. L. speech delivered on company time and property to the members of the Five and Over Club fifteen minutes before the election

At 4:15 p. m., just prior to the election which began at 4:30 p. m., Spallino called a meeting of the Five and Over Club in the plant (R. I, 81–82; R. II, 507–510). The foremen of the various plant departments announced the time and place of the meeting,

and about two hundred members of the Club attended and were evidently paid for the fifteen minutes' time spent there (R. I, 82, n. 17; R. II, 509–510, 511; R. III, 1028–1029). Lovasco, introduced by Spallino, delivered a pro-A. F. L. speech which, like that of O'Keefe's, emphasized that it would be to the employees' advantage to vote for the A. F. L. inasmuch as most stove factories were under A. F. L. contract (R. I, 82; R. II, 510–511; R. IV, 1569). Immediately thereafter the employees went to the polls (R. I, 82; R. II, 511).

C. The victory of the C. I. O. at the polls

At the election, of the 341 employees eligible to vote, 177 voted for the C. I. O., 114 voted for the A. F. L., five voted for neither, and two cast void ballots (*Infra,* p. 67). In due course, the Board's Regional Director issued a Consent Determination of Representatives, herein called the certification, in which he found and determined that the C. I. O. was the exclusive bargaining representative of the production and maintenance employees (*Infra,* p. 68).

D. The November 27 pro-A. F. L. speech by the corporation's president

On November 27, a week after the election, O'Keefe delivered a second pro-A. F. L. speech to the corporation's employees in the plant during working hours (R. I, 84, R. II, 502–505, R. III, 1095–1105). O'Keefe began by promising the piece-time workers that they would be paid for the time spent listening to his speech (R. III, 1095). He expressed his regret that the C. I. O. won the election, and stated that

the C. I. O. would be unable to negotiate a contract which would bring the employees any greater benefits than the A. F. L. would have been capable of obtaining (R. I, 84; R. III, 1096–1097). He adverted to his previous speech, and repeated his warning of the drastic loss of business which the selection of the C. I. O. assertedly entailed (R. III, 1097–1099). The corporation's products "might just as well be marked "Made in Japan" as not to have the A. F. of L. label on them, which means that *unless we made other arrangements for manufacturing these,* we are not going to do much in the water-heater business" (R. I, 84; R. III, 1098–1099). [Emphasis supplied.] The corporation's chief engineer (subsequently to become the partnership's general manager) refused to accept his new assignment because "he figures that selling water heaters made by C. I. O. men to A. F. of L. builders is a lot harder than selling refrigerators to the eskimos" (R. III, 1099). But, he was "reconciled to all this" until he had spoken to several friends and prospective customers who expressed their regret that they would be unable to award him some lucrative contracts in view of the C. I. O. affiliation of his employees (R. III, 1099–1100). It was humiliating, O'Keefe said, to have these people say, "You must have the dumbest clucks in the world working for you when they are in the Building Trades Industry and vote C. I. O." (R. III, 1100). He then advised his employees, "You know after all, there is only a little difference between success and failure—that little difference comes in exercising good judgment" (R. III, 1100).

He again emphasized that the contemplated expansion of the business could not be undertaken *"unless we make some kind of arrangement for the manufacture of our ranges that will be satisfactory to the A. F. of L."* (R. III, 1101). "The future looked brighter than it ever did since we have been in business, when all of a sudden, I presume spurred on by big promises and maybe a desire to do us some harm, a majority of you, through bad judgment, poor information or some other reason, have thrown a curtain that makes things darker than they have ever been" (R. III, 1101–1102). He mentioned by name four C. I. O. adherents among the employees concerning whom he found it difficult to believe, in view of the corporation's past favors to them, that they had intentionally "wished to work a hardship on the rest" (R. III, 1102–1103). He concluded by saying, "Now, I realize that the election is over—you have voted C. I. O. Even if you changed your minds tomorrow, we could not have another election for at least six months and maybe a year. *Therefore, if we wish to do business with the builders and in San Francisco territory, we have two alternatives—to contract enough of our labor to a firm with an A. F. of L. contract, in order that they would take us off the unfair sheet—or to take advantage of the possibilities to sell this business to some one who has an A. F. of L. organization"* (R. I, 84; R. III, 1104). [Emphasis supplied.] As a parting thrust, he stated

that two officers of the corporation, one of whom had previously dealt with the C. I. O., were so discouraged with the prospects that they want "to sell out" (R. I, 84; R. III, 1104).

E. The inconclusive bargaining negotiations between the C. I. O. and the corporation

Following the certification of the C. I. O. as the exclusive bargaining representative, five bargaining conferences were held between the corporation and the C. I. O. on December 15 and 25, 1945, and on January 3, 8, and 25, 1946, in Collins' office at the plant (R. I, 89–93; R. II, 768–769, 771, 773, 775, 787, 791–792). The principal negotiators were Cecil Collins, on behalf of the corporation, and John Despol, on behalf of the C. I. O. During the course of the negotiations, the familiar subjects of collective bargaining contracts were discussed (R. I, 89–93; R. II, 768–794). The negotiations, which failed to culminate in agreement, were marked by events which revealed, as the Board found (R. I, 98–101), that the corporation participated in them without a sincere purpose of composing differences.

At the first meeting on December 15, Despol submitted a proposed contract to Collins, and further discussions were postponed in order to afford Collins the opportunity of studying the document (R. I, 89; R. II, 768–771, R. IV, 1665–1693). At the second meeting, after indicating his position on certain wage and union security provisions, Collins asserted "that he had not had time to thoroughly go over the bal-

ance of [the] contract" (R. II, 772). At the third meeting, Collins declined to discuss the hours of work provision of the proposed contract because "he wanted to read that more thoroughly, he was not ready to decide on the exact language" (R. II, 776). At the fourth meeting, Collins stated "that he had not found the time to read carefully all the language of [the] contract, and that he was still not sure of some of the language." (R. II, 789). In order to prevent further evasiveness, Despol requested and Collins agreed to submit within a week written counterproposals to each provision of the proposed contract (R. I, 92; R. II, 789, 791). At the last meeting, no counterproposals having been received in the interim, Despol repeated his request, but neither then nor thereafter has Collins fulfilled his promise to submit counterproposals (R. I, 92; R. II, 793–794, 791).

At the third bargaining conference on January 3, Collins invited a committee of A. F. L. adherents among the employees to attend the meeting ostensibly for the purpose of protecting the A. F. L. interests in the plant (R. I, 90; R. II, 773–775, 853–855, R. IV, 1395, 1544, 1556–1557). In the presence of these employees, Collins announced to Despol that their negotiations would probably prove a waste of time, because the corporation was planning to transfer its manufacturing facilities to the partnership. As a result of attendant decrease in the corporation's production and maintenance force, the C. I. O. would then be left with

very few employees to represent (R. I, 90; R. III, 1286–1288, R. IV, 1544, 1557–1558, 1378). Despol protested that the C. I. O. did not intend to lightly surrender the time, money, and effort expended in organizing the plant, and that, if necessary, the employees would strike in order to secure a satisfactory agreement (R. I, 91–92; R. III, 1288–1289; R. IV, 1545–1548, 1558–1559, 1378–1381). Collins stated that if the anticipated transfer were completed, he would seek to have the corporation reimburse the C. I. O. for its organizational expense on condition that the C. I. O. refrain from striking and litigate any controversy between the corporation and the C. I. O. before the Board and the courts (R. I, 91; R. III, 1288–1291, 1380, 1549, 1559–1560).

At the fourth bargaining conference, on January 8, Collins invited another committee of A. F. L. adherents to attend the meeting (R. I, 91; R. II, 787–788, R. IV, 1557, R. III, 1302–1303). Despol objected to the presence of any committee purporting to represent the A. F. L. (R. I, 91–92; R. II, 788). He accepted their presence at this meeting because the discussion would be limited to procedural aspects of the contract, but he insisted that since the ensuing negotiations would relate to "wage and cost factors of the contract" he would not in the future consent to bargain in the presence of any such committee (R. I, 92; R. II, 788; R. III, 1303). During the meeting,

Collins reiterated his prediction that an impending deal between the corporation and the partnership would render the negotiations futile (R. III, 1303–1304).

Throughout the negotiations, Despol sought to persuade Collins to consent to a "union shop" contract, but the latter was willing to consider only maintenance of membership and check-off provisions (R. I. 89–90; R. II, 772, 776, 851; R. III, 1303; R. IV, 1558). Nevertheless, three days after the last meeting with the C. I. O. on January 28, Collins on behalf of the partnership, entered into a closed-shop agreement with the A. F. L. covering the same group of employees for whom the C. I. O. was negotiating (*infra,* p. 28).

F. The execution of the plan to evade bargaining with the C. I. O.

At the same time that the corporation was ostensibly bargaining with the C. I. O. in order to arrive at a mutually satisfactory agreement, the corporation was negotiating a transfer of its manufacturing facilities to the partnership, with attendant transfer to the partnership of most of its production and maintenance employees, for the purpose of setting at naught the certification of the C. I. O. as the employee's exclusive bargaining representative; and the partnership, through Collins, was negotiating a closed-shop agreement with the A. F. L. to be presented as a *fait accompli* to the production and maintenance employees who had chosen the C. I. O. to represent them.

1. The relationship between the corporation and the partnership

On November 15, 1945, an instrument entitled "Articles of Copartnership" was executed which resulted in the alteration of the membership of the partnership as it then existed (*supra,* pp. 4–5) through the withdrawal of one partner and the admittance of four new partners (R. I, 72; R. IV, 1747–1752, 1711–1715). The resultant interlocking relationship between the partnership and the corporation, measured in terms of common financial holdings, family kinship, and positions of authority in the respective business entities, is illustrated in the following table:

Name (those *italicized* are members of the partnership)	Family relationship	Position in corporation	Holdings in corporation (percent) (R. I, 71; R. III, 1124)	Holdings in partnership (percent) (R. I. 72; R. IV, 1749–1750)	
			Percent	*Percent*	
D. P. O'Keefe		Director, president	23.7		(R. I, 70; R. III, 1049, 1051).
Wm. J. O'Keefe	Son	Director, plant superintendent until shortly before reorganization of partnership.	4.8	12.5	(R. I, 70–71; R. III, 1049, 1076, 1150, R. IV, 1528).
L. J. Mitchell	Son-in-law	Auditor		12.5	(R. I, 72, n. 7; R. III, 1126, 1075, 1133, 1205).
Phyllis J. Mitchell	Daughter (wife of L. J. Mitchell).		4.8		(R. I, 72, n. 7; R. III, 1126).
			33.3	25.0	
R. J. Merritt		Director, secretary-treasurer	12.5	12.5	(R. I, 70–71; R. III, 1048–1049).
Lucille Merritt	Wife	Director	16.8		(R. I, 70–71; R. III, 1049, 1121).
R. J. Merritt, Jr	Son		4.0	12.5	(R. I, 71; R. III, 1126).
			33.3	25.0	
Willis J. Boyle		Director, vice president	8.1		(R. I, 70; R. III 1048–1049).
Blanche M. Boyle	Wife		8.3		(R. III, 1203).
Marion Jenks	Daughter		.1	12.5	(R. III, 1126).
John E. Boyle	Son		.1		(R. III, 1203–1204).
			16.6	12.5	
Lewis M. Boyle	Brother		8.3	12.5	(R. III, 1067).
Evelyn B. Boyle	Wife or Daughter		8.3		(R. III, 1203).
			16.6	12.5	

W. J. and L. M. Boyle, trustees	Brothers		.1 33.3	 25.0	(R. III, 1067).
Arlene B. Oliphant			.1		
W. G. Durant		Chief Engineer earning in excess of $100,000 per year. Upon reorganization of partnership, he became the managing partner.		25.0	(R. I, 72; R. III, 1073, 1140-1141, R. IV, 1420-1422).

the premises in repair," to "furnish all utilities," and to "pay all taxes and insurance on the premises and equipment" (R. I, 95; R. III, 1114).

The partnership agreed "to manufacture any and all products required of it" by the corporation in accordance with the specifications and standards of care prescribed by the corporation, and the partnership further agreed not to manufacture any products other than corporation products without first obtaining "the written consent" of the corporation. The corporation is required to "furnish all material and equipment * * * necessary to perform said service." In compensation for its services, the partnership is to receive "the cost of labor plus two and one-half percent" (R. I, 95; R. III, 1113–1114).

The partnership agreed to hire all the employees currently working for the corporation without any loss in wages, seniority, or other benefits. In order to maintain the existing employee benefits, the corporation agreed to compensate the partnership for expenses incurred in maintaining a pension fund, insurance plan, Christmas bonuses, and contributions to the Five and Over Club (R. I, 95; R. III, 1112, 1114). The agreement, inclusive in all these respects, was significantly free of any mention of the obligation to bargain with the C. I. O., although the partnership knew, through its managing partner, even assuming the fiction of separate business entities, that the C. I. O. was the certified representative of the employees (R. I, 103; R. IV, 1447).

3. The reason for the transfer of manufacturing facilities and execution of the closed-shop agreement

A major consideration for the transfer of manufacturing facilities was the desire to avoid the obligation of bargaining with the C. I. O. (R. I, 93–94; R. III, 1141–1142, 1144). Thus, President O'Keefe quite candidly testified as follows (R. III, 1144):

> Well, we were on the unfair list with the A. F. L. and all our business came, or not all of it but a lot of it was done with the Building Trades, and I figured that we could lease to someone who would work under a contract, that would be satisfactory to the A. F. of L., we would probably be getting off the unfair list.

And he earlier testified that in order to avoid "many labor arguments around there of different kinds" between the A. F. L. and the C. I. O., he "figured the easy way would be to lease the buildings to Pioneer Electric [partnership] and let them do the worrying about it" (R. III, 1141–1142).[7a]

4. The partnership enters into a closed-shop agreement with the A. F. L.

Sometime between President O'Keefe's second pro-A. F. L. speech on November 27, 1945, and a third announcement by O'Keefe to the employees on February 1, 1946, Collins delivered a pro-A. F. L. speech to the employees in the plant during working hours (R. I,

[7a] Another consideration was OPA and tax advantages, but, as the Board noted, respondents "failed to separate" the legal reason from the illegal reason, and hence failed to relieve themselves of the responsibilities for the illegal one (R. I, 180; R. III, 1027–1028; R. IV, 1428–1429, citing *N. L. R. B.* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872 (C. C. A. 2), cert. denied, 304 U. S. 576). See, *infra*, pp. 85–86.

101; R. III, 1115–1117; R. II, 569; R. III, 1109–1110). He adverted to O'Keefe's earlier pro-A. F. L. speech, and reemphasized O'Keefe's conviction that avoidance of economic distress to the corporation and to the employees required the consummation of an agreement with the A. F. L. With a bland disregard for consistency, Collins reported to the employees that he was nevertheless attempting, in good faith, to negotiate an agreement with the C. I. O. He thought it necessary, however, to assure them that "None of you is going to be forced into any union you do not want to join," a promise which he forthwith proceeded to break by negotiating a closed-shop agreement with the A. F. L. unions on behalf of the partnership (R. I, 101–102 and n. 34; R. III, 1115–1116).

During the month of January 1946, despite his knowledge of the outstanding certification of the C. I. O. (R. I, 103; R. IV, 1447), W. G. Durant, the managing partner of the partnership, authorized Collins to negotiate a collective bargaining agreement with the A. F. L. (R. I, 103; R. IV, 1437, 1465). At the time these negotiations were authorized, the partnership had in its employ only fifteen production and maintenance employees, none of whom, according to Durant, belonged to any union; but the negotiations were undertaken with the view of embracing within the terms of the collective agreement the three hundred production and maintenance employees of the corporation whose transfer to the partnership was imminent (R. I, 103 and n. 36; R. IV, 1453–1454, 1436–1438, 1443, 1445–1446, 1464–1466). On January 31, 1946, following a few bargaining conferences with Collins (R. I, 103;

R. IV, 1444), thirteen representatives of the various A. F. L. Unions met with Durant in Collins' office in the plant, and executed a closed-shop agreement, predated to January 2, 1946 (R. I, 94, n. 25, 103, n. 37; R. IV, 1455–1458), covering all the production and maintenance employees of the plant (R. I, 103; R. IV, 1435–1437, 1464–1466, 1723–1738). The entire transaction was consummated in five minutes (R. I, 103; R. IV, 1445). No proof was required of the A. F. L. unions to show that, in fact, they represented a majority of the employees (R. I, 103–104; R. IV, 1436–1438, 1442–1443, 1445–1446). In this atmosphere of inordinate haste the corporation's employees were blanketed into the partnership's closed-shop agreement with the A. F. L. (R. I, 103–104, 105; R. IV, 1436–1438, 1442–1443, 1445–1446).

5. The announcement to the employees of their transfer to the partnership and of the closed-shop agreement with the A. F. L.

On February 1, 1946, the day following the execution of the closed-shop and manufacturing transfer agreements, President O'Keefe made an announcement to the employees to apprise them of the situation (R. I, 95–96; R. II, 504, 523; R. III, 1105–1109). He stated that (R. I, 95; R. III, 1106–1107):

> Some time ago I talked to you about having another firm manufacture our products and proceeded to work out what we felt to be a very satisfactory arrangement. These arrangement were to start February 1st, but inasmuch as this was the last day of the week, we changed the date to February 4th which is Monday. Consequently, starting Monday, the * * * [partnership] will do all the manufacturing for

> * * * [the corporation]. We [the corporation] will handle the sales, shipping, and service; also, all new construction work.

O'Keefe further stated that the agreement to transfer manufacturing facilities provided for the retention of all employee benefits, and he read relevant portions of the agreement to them (R. III, 1107). He stressed that the partnership's wage scale was higher than that of the corporation, and he promised that in appreciation of the employees' cooperation, the corporation would add to the January wages of the employees the difference between the two wage scales provided the employees continued in the partnership's employ through the month of February (R. I, 95–96; R. III, 1108).

The corporation's retroactive supplemental wage inducement was designed as a palliative to obtain the employee's accession to the requirement of the A. F. L. contract that all employees become members of the A. F. L. within fifteen days of the execution of the contract (R. I, 96 and n. 27; R. IV, 1724, R. II, 523). Roberts of the Stove Mounters, A. F. L., who also spoke to the employees on this occasion, "urged the boys to fall in line as soon as possible, to back the A. F. L." (R. I, 523).

6. The completion on February 4 of the transfer of employees and manufacturing facilities

On February 4, 1946, as agreed, the transfer of manufacturing facilities was completed and the partnership's manufactures of products on behalf of the corporation was undertaken (R. III, 1118–1119, 1211). In conjunction therewith, about three hundred pro-

duction and maintenance employees previously on the corporation's pay roll, with the minor exception of truck drivers, service and maintenance personnel, commenced employment with the partnership (R. I, 103, n. 36; R. III, 1231, 1331–1332, R. IV, 1515, 1525–1526, R. III, 1320–1321). Their "new" employment involved no more than a formal, paper transfer of records (R. III, 1320–1321, 1329–1331), and the plant's manufacturing and operating procedures continued in substantially the same routine as existed prior to the transfer (R. IV, 1370–1372, 1429–1431, 1452; R. III, 1333–1334). Thereafter, in conformity with the design to evade bargaining with the C. I. O., the corporation refused to bargain with the C. I. O. except with respect to the relatively few employees still on its nominal pay roll, and even as to them the corporation's president expressed reluctance to bargain (R. III, 1153–1154); the partnership, as an ostensible stranger to the certification, likewise refused to bargain with the C. I. O. (R. I, 77, 100–101; R. II, 777–778, 811–812; R. III, 950–951, 981–982, 1151; R. IV, 1438, 1515; R. III, 1307–1309).

II. The Board's conclusion of law

On the basis of the foregoing facts the Board concluded that respondents had engaged in a course of conduct which transgressed the rights guaranteed employees in Section 7 of the Act, in violation of Section 8 (1) and (5) of the Act. The Board found the elements of that illegal course of conduct to consist of, (1) the corporation's widespread participation in the electoral campaign on behalf of the A. F. L.

prior to the consent election (R. I, 82–84); (2) its continuing acts of assistance to the A. F. L. subsequent to the election (R. I, 96, 105–106); (3) the partnership's joinder in the course of unfair conduct dating from January 3, 1946, when the corporation during a bargaining conference with the C. I. O. announced for the first time the impending transfer of manufacturing facilities from the corporation to the partnership the objective of which was to negate the C. I. O.'s certification (R. I, 97–98, 102–103); (4) the refusal of the corporation and the partnership to bargain with the C. I. O. despite its outstanding certification (R. I, 98–101); (5) the entry into a closed-shop contract with the A. F. L. (R. I, 105–106); (6) the offer of a retroactive wage increase designed to palliate the displacement of the C. I. O. as the bargaining agent (R. I, 96); and (7) President O'Keefe's preelection speech of November 20 and postelection speech of November 27 which were coercive in character (R. I, 85–86, 83).

III. The Board's order and recommended modifications

The Board's order requires the corporation, the partnership, and the partners individually to cease and desist from (a) "urging, persuading, warning, or coercing their employees to join" the A. F. L., encouraging membership in the A. F. L., and discouraging membership in the C. I. O. or any other labor organization of their employees (R. I, 181–182); (b) recognizing or dealing with the A. F. L. as the exclusive bargaining representative of their employees unless and until it has been certified by the Board

(R. I, 182); (c) giving effect to the union-shop contract with the A. F. L. or any subsequent related agreement (R. I, 182–183); and (d) refusing to bargain collectively with the C. I. O. (R. I, 183).[7b] The Board's order further requires the corporation, the partnership, and the partners individually to take the "following affirmative action": (a) withdraw and withhold recognition from the A. F. L. as exclusive bargaining representative of their employees unless and until it shall have been certified by the Board (R. I, 183–184); (b) upon request, to bargain collectively with the C. I. O. (R. I, 184); and (c) to post appropriate notices (R. I, 184–185).

In its petition for enforcement of the Board's order (R. I, 195–207), the Board recommended modification of the order in certain respects to conform with the amendments to the Act (R. I, 202–204). In order to conform with the requirements of Section 8 (c) of the Act, as amended, the Board recommended that the words "urging, persuading, or warning" in paragraph 1 (a) of the order be modified by the words "by threat of reprisal or force or promise of benefit" (R. I, 202). In order to conform with the policy expressed in Section 9 (f), (g) and (h) of the Act, as amended, of withdrawing the aid of the Act's processes from a labor organization which fails to comply with the provisions of Section 9 (f), (g), and (h), to the extent only that the unfair labor

[7b] Board Member Reilly dissented only from that portion of the order on a ground discussed at pp. 85–87 *infra*. However, he did concur in the remainder of the order.

practice involves a refusal to bargain to be remedied by an order to bargain, the Board recommended that paragraphs 1 (d) and 2 (b) of the order, requiring respondents to bargain with the C. I. O., be conditioned upon the C. I. O.'s compliance with Section 9 (f), (g), and (h) within thirty days of the decree enforcing the order (R. I, 203). The Board also recommended modification of the posted notices to accord with the recommended changes in the order (R. I, 202–203, 203–204).

SUMMARY OF ARGUMENT

I. During the pre-election period of rival organizational activity between the C. I. O. and the A. F. L., the corporation illegally assisted the A. F. L. by permitting it to solicit membership on company time and property, by surreptitiously enlisting rank-and-file employees to aid the A. F. L. in that activity, and by permitting the holding of a pro-A. F. L. meeting on plant property.

Subsequent to the election, upon the C. I. O.'s certification as exclusive bargaining representative, the corporation initially, and subsequently the partnership, refused to bargain with the C. I. O. They frustrated the bargaining process by refusing to submit counterproposals, by inviting A. F. L. committees to attend the bargaining conferences, by announcing in the presence of these A. F. L. committees that bargaining would be futile because of an imminent transfer of manufacturing facilities from the corporation to the partnership, and by the contemporaneous execution of a closed-shop agreement with the A. F. L.

covering the same group of workers for whom the C. I. O. was certified as exclusive bargaining agent. The entry into the closed-shop agreement with the A. F. L. was the capstone of the plan to divest the C. I. O. of its bargaining rights and was the fruition of gross employer partisanship. It was bulwarked by further unlawful assistance to the A. F. L. in the form of a monetary award by the corporation to the employees in order to secure their acquiescence in the displacement of the C. I. O. as bargaining representative.

Section 8 (c) of the Act, as amended, does not protect the speeches in this case. That section specifically interdicts employer utterances which contain a "threat of reprisal or force or promise of benefit." It does not permit intrusion of the employer's economic power through speech which connotes compulsion or benefit. In determining the presence of a threat or promise, Section 8 (c) does not exclude reference to relevant extrinsic circumstances connected with the utterance. Judged by these criteria, the speeches in this case are coercive in character because they seek to instill in the employees fear for their job security should they, in disregard of the employer's will, choose to bargain through the C. I. O.

II. In the exercise of the wide degree of discretion entrusted to it in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees, the Board properly found that the consent election was fairly conducted and accurately reflected the employees' preference for the C. I. O.

III. The relationship between the corporation and the partnership, their joint relationship to the employees, and their common responsibility for the unfair labor practices, the effect of which must be expunged, justifies their amenability as joint employers to the remedial powers of the Act and makes appropriate the requirement that they bargain with the C. I. O. The C. I. O.'s status as the bargaining agent was unimpaired, not only because the presumption of the continuity of its majority status had not been rebutted, but also because any defection from it was attributable to the employer's unfair labor practices. The requirements that respondents cease recognizing the A. F. L. and giving effect to the contract with it are the acknowledged remedies for illegal assistance to a union culminating in a contract with it.

IV. The Board acquired jurisdiction over each partner individually by valid service of process and general appearance. In any event, the service and appearance were adequate to subject the partnership as an entity to the Board's jurisdiction.

V. Compliance by the C. I. O. with the provisions of Section 9 (f), (g), and (h) of the Act, as amended, is irrelevant to the enforcement of that portion of the Board's order which remedies the violations of Section 8 (1) of the Act. Compliance by the C. I. O. with Section 9 (f), (g), and (h) is, however, properly exacted as a condition precedent to the enforcement of that portion of the Board's order which requires the employer to bargain with the C. I. O. as a remedy for the violation of Section 8 (5) of the Act.

ARGUMENT

I. The Board's finding that respondent's course of conduct violated Section 8 (1) and (5) of the Act is supported by substantial evidence

In the contest between members of rival unions to secure the favor of a majority of the employees, the Act adjures the employer not to assist one union as against another. The Act's purpose is to eliminate insofar as possible the capacity for interference with the free choice of employees which inheres in the employer by virtue of his economic power. The common denominator of employer assistance to labor organizations, every form of which "is forbidden,"[8] is the employer's utilization of the property and personnel which he controls to bring the weight of his economic power to bear in favor of one union as opposed to another. A labor organization which is the beneficiary of such employer assistance has, of course, an undue advantage in that it attracts to membership those employees who are led to believe that by designation of the favored labor organization they will receive special consideration from the employer which would not inure to them from the selection of the unassisted union. Thus a favored labor organization, though it may not be the creature of the employer, is not, because of the intrusion of the economic power of the employer, the freely expressed choice of the employees. To such a situation the Board is required to bring to bear the remedial powers of the Act in order to divest the assisted

[8] *N. L. R. B.* v. *Electric Vacuum Cleaner Company, Inc.*, 315 U. S. 685, 693.

union of its unlawful advantage and to restore the conditions of a free choice. Tested within the framework of these principles, so often reiterated as to be axiomatic, the conduct of the corporation and the partnership is shown to be in flagrant disregard of fundamental duties.[9]

A. The assistance to the A. F. L. prior to the election

The conduct of the corporation prior to the consent election constituted potent support to the A. F. L. in its organizational campaign. "The commencement of the * * * [C. I. O.'s] campaign for membership * * * brought cooperative action between the employer and the * * * [A. F. L.] to strengthen the latter's position." *N. L. R. B.* v. *Electric Vacuum Cleaner Company, Inc.,* 315 U. S. 685, 692. The introduction of the A. F. L. to the plant was facilitated through the efforts of Collins, the corporation's attorney and labor relations advisor. His office became the A. F. L.'s campaign headquarters. He donated to the A. F. L. the services of two rank and file employees who, on company time and property without loss of pay and in lieu of their customary work, proselytized for the A. F. L. One of them reported to the A. F. L.

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[9] *I. A. M.* v. *N. L. R. B.*, 311 U. S. 72; *N. L. R. B.* v. *Electric Vacuum Cleaner Company, Inc.*, 315 U. S. 685; *Elastic Stop Nut Corporation* v. *N. L. R. B.*, 142 F. 2d 371 (C. C. A. 8); *N. L. R. B.* v. *John Engelhorn & Sons*, 134 F. 2d 553 (C. C. A. 3); *American Smelting & Refining Company* v. *N. L. R. B.*, 128 F. 2d 345 (C. C. A. 5); *N. L. R. B.* v. *National Motor Bearing Company*, 105 F. 2d 652 (C. C. A. 9); *N. L. R. B.* v. *Cowell Portland Cement Co.*, 148 F. 2d 237 (C. C. A. 9).

organizers in Collins' office and in his presence the state of employee opinion in the plant, and suggested and arranged for A. F. L. meetings in an effort to stir up enthusiasm for the A. F. L. Finally, fifteen minutes before the election, a pro-A. F. L. meeting of the Five and Over Club was permitted to be held on company time and property, a meeting which was announced to the employees through the foremen.

These activities are familiar forms of employer assistance to a labor union. The solicitation of membership on company time and property,[10] the surreptitious enlistment of rank and file employees for that purpose,[11] and the holding of a union meeting on plant property[12] have been uniformly condemned. In engaging in such interdicted conduct, a course which it continued to pursue after the election, the corporation furnished unlawful support to the A. F. L.

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[10] *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 231, note 8; *I. A. M.* v. *N. L. R. B.*, 311 U. S. 72, 76–77; *American Smelting & Refining Company* v. *N. L. R. B.*, 128 F. 2d 345, 346 (C. C. A. 5); *Elastic Stop Nut Corporation* v. *N. L. R. B.*, 142 F. 2d 371, 375 (C. C. A. 8).

[11] *N. L. R. B.* v. *John Engelhorn & Sons*, 134 F. 2d 553, 556 (C. C. A. 3); *Triplex Screw Company* v. *N. L. R. B.*, 117 F. 2d 858, 860 (C. C. A. 6); *Atlas Underwear Company* v. *N. L. R. B.*, 116 F. 2d 1020, 1022 (C. C. A. 6).

[12] *N. L. R. B.* v. *Pacific Gas and Electric Company*, 118 F. 2d 780, 784 (C. C. A. 9); *N. L. R. B.* v. *Lane Cotton Mills Co.*, 111 F. 2d 814, 816 (C. C. A. 5); *N. L. R. B.* v. *Idaho Refining Company*, 143 F. 2d 246, 248 (C. C. A. 9); *S. H. Camp & Company* v. *N. L. R. B.*, 160 F. 2d 519, 524 (C. C. A. 6).

B. The refusal to bargain and further assistance to the A. F. L.

Subsequent to the election, the certification of the C. I. O. as the statutory bargaining representative of the production and maintenance employees imposed upon the corporation the duty of entering into "sincere negotiations with the representatives of the employees" *N. L. R. B.* v. *Biles Coleman Lumber Co.*, 98 F. 2d 18, 22 (C. C. A. 9). The test of sincerity is aptly summarized in *N. L. R. B.* v. *Boss Mfg. Co.*, 118 F. 2d 187, 189 (C. C. A. 7), and approved by this Court in *N. L. R. B.* v. *Montgomery Ward & Company,* 133 F. 2d 676, 684 (C. C. A. 9):

> Collective bargaining, as contemplated by the Act, is a procedure looking toward the making of a collective agreement between the employer and the accredited representative of his employees concerning wages, hours and other conditions of employment. Collective bargaining requires that the parties involved deal with each other with an open and fair mind and sincerely endeavor to overcome obstacles or difficulties existing between the employer and the employees to the end that employment relations may be stabilized and obstruction to the free flow of commerce prevented. [Cases cited.] Mere pretended bargaining will not suffice [cases cited], neither must the mind be hermetically sealed against the thought of entering into an agreement [case cited].

Tested by this standard, the course of negotiations in this case is a negation of the employer's duty to bargain.[13]

Throughout the negotiations between the C. I. O. and the corporation, whenever Collins, the corporation's representative, chose to conclude discussions on a given item, he would conveniently plead that he had not had an opportunity to study fully the C. I. O.'s proposals (*supra,* pp. 17–18). In order to preclude continued evasiveness, the C. I. O. at the fourth bargaining conference requested the submission of written counter-proposals to each item of its proposed contract. Despite his agreement to do so, Collins

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[13] Compare Section 8 (d) of the Act, as amended, which defines the duty "to bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *." This provision represents in essence legislative confirmation of the standard of good faith bargaining as administratively evolved and judicially approved prior to the Act's amendment. *Matter of National Maritime Union*, 78 N. L. R. B., No. 137; 22 L. R. R. M. 1289, 1296; Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 274, 282 (1948); Weyand, The Scope of Collective Bargaining Under the Taft-Hartley Act, Proceedings of New York University First Annual Conference on Labor, 1948, p. 258. For representative earlier cases embodying this standard, see *Matter of St. Joseph Stock Yards Co.*, 2 N. L. R. B. 39; *Globe Cotton Mills* v. *N. L. R. B.*, 103 F. 2d 91, 94 (C. C. A. 5); *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 523–526; *N L. R. B.* v. *Pilling & Son Co.*, 119 F. 2d 32, 37 (C. C. A. 3); *Rapid Roller Co.* v. *N. L. R. B.*, 126 F. 2d 452, 459–460 (C. C. A. 7), cert. denied, 317 U. S. 650.

never complied with this reasonable request. Failure in this regard justified an inference of insincerity.[14]

Collins invited committees of A. F. L. adherents among the employees to attend the third and fourth bargaining conferences with the C. I. O. (*supra,* pp. 18–19). Such conduct, without more, justifies an inference of insincerity. "The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representative of his employees. The obligation being exclusive, * * * it exacts 'the negative duty to treat with no other.'" *Medo Photo Supply Corporation* v. *N. L. R. B.,* 321 U. S. 678, 683–684. Seeking out minority groups among the employees was "subversive of the mode of collective bargaining which the statute has ordained

[14] *N. L. R. B.* v. *Montgomery Ward & Co.*, 133 F. 2d 676, 687 (C. C. A. 9); *N. L. R. B.* v. *Pilling & Son Co.*, 119 F. 2d 32, 37 (C. C. A. 3). The significance of the failure to submit counterproposals as indicative of bad faith bargaining is emphasized by the legislative history of the amendments to the Act. In observing that the obligation to bargain collectively, as defined by Section 8 (d) of the Act, as amended, "does not require either party to agree to a particular demand or to make a concession," the Senate Report on the bill which became the Act, as amended, stated that "It should be noted that the word 'concession' was used rather than 'counterproposal' to meet an objection raised by the Chairman of the Board to a corresponding provision in one of the early drafts of the bill." S. Rep. No. 105, 80th Cong., 1st Sess., 24. The corresponding provision of the House bill, as reported and passed, provided that the term "bargain collectively" "shall not be construed as requiring that either party * * * submit counterproposals." 1 Legislative History of the Labor Management Relations Act, 1947, Gov't Print. Off., 1948, pp. 36, 39, 163, 166; H. Rep. No. 245, 80th Cong., 1st Sess., 19, 21, 70. In conference, the House provision was abandoned in favor of the Senate version of the obligation to bargain. H. Conf. Rep., 80th Cong., 1st Sess., 34.

* * *" (*Ibid.*). Such conduct is on analogy and in principle no different from outright repudiation of the collective bargaining representative through "bargaining with individuals or minorities." *May Department Stores Co.* v. *N. L. R. B.,* 326 U. S. 376, 384; *N. L. R. B.* v. *Montgomery Ward & Co.,* 133 F. 2d 676, 681–682 (C. C. A. 9).

The vice of Collins' conduct did not cease with arranging the presence of the A. F. L. committees at the bargaining conferences. He took the occasion of their presence to announce to the C. I. O. that its effort to negotiate a contract would probably prove futile because of the impending transfer of manufacturing facilities from the corporation to the partnership (*supra,* p. 18). Thus he sought actively to demonstrate to the employees the impotence of the C. I. O., to hearten the A. F. L. adherents, and through them to proclaim to all the employees that they would be given another opportunity of choosing the A. F. L. The utilization of a bargaining conference as a forum for the dissemination of views antagonistic to the bargaining representative is no more than another version of an employer's effort "to go behind the chosen bargaining agent and negotiate with the employees individually, or with their committees, in spite of the fact that they have not revoked the agent's authority [and] would result in nothing but disarrangement of the mechanism for negotiation created by the Act, disparagement of the services of the union, whether good or bad, and acute, if not endless, friction, which it is the avowed purpose of the Act to avoid or mitigate." *N. L. R. B.* v.

Acme Air Appliance Company, Inc., 117 F. 2d 417, 420 (C. C. A. 2), quoted with approval in *N. L. R. B.* v. *Montgomery Ward & Co.,* 133 F. 2d 676, 681 (C. C. A. 9).

These overt manifestations of insincerity occurring during the bargaining conferences were verified by Collins' contemporaneous bargaining with the A. F. L. for the very same group of employees for whom the C. I. O. had been certified. It is hardly necessary to belabor the utter incompatibility between an honest effort to reach agreement with a certified union and concurrent bargaining with a rival union rejected by the employees at the polls. The entry into an agreement with the A. F. L. embodying a closed-shop provision preceded by a refusal to discuss a like union security provision with the C. I. O. demonstrates beyond doubt that it was not legitimate differences concerning the subject matter of the contract which prevented accord with the C. I. O. Rather, it was the willful effort of the corporation and the partnership, acting through Collins, their common agent, to exercise a veto power over the employees' choice of a bargaining agent which erected the unsurmountable barrier to agreement.

The foregoing conduct not only evidenced a refusal to bargain, but independently of that, in seeking to appeal to the employees over the head of their bargaining representative, it undercut the authority of the C. I. O., and constituted further assistance to the A. F. L.

C. Assistance to the A. F. L. through the closed-shop contract and the supplemental wage inducement

The entry into the closed-shop contract with the A. F. L. was the crowning point of the campaign to divest the C. I. O. of its bargaining rights. The quick negotiation of this agreement, without even requiring the A. F. L. to submit proof of representation interest which common prudence at least would seem to dictate in view of the recent and outstanding certification of the C. I. O. (*supra,* pp. 28–29), "is itself evidential of assistance to the contracting union." *N. L. R. B.* v. *John Engelhorn & Sons,* 134 F. 2d 553, 556 (C. C. A. 3).[15] Referring to a situation in which the employer executed a contract with one of two competing unions during an organizational campaign, the Court of Appeals for the Eighth Circuit characterized such conduct as a transgression of the employer's obligation "to maintain a total, complete and honest neutrality [citations]. [The employer] * * *, prior to the period of its contract negotiation, had shown its intention to swing its weight on the side of the [contracting union] * * *, and it could not have been unaware of the advantage given the [contracting union] * * * by signing a contract with that organization [citation]. The Board

[15] See also *I. A. M.* v. *N. L. R. B.*, 311 U. S. 72, 79; *N. L. R. B.* v. *Electric Vacuum Cleaner Company, Inc.*, 315 U. S. 685, 695; *N. L. R. B.* v. *National Motor Bearing Company*, 105 F. 2d 652, 659–660 (C. C. A. 9); *N. L. R. B.* v. *Cowell Portland Cement Company*, 148 F. 2d 237, 240 (C. C. A. 9); *Elastic Stop Nut Corporation* v. *N. L. R. B.*, 142 F. 2d 371, 376, 379–380 (C. C. A. 8); *N. L. R. B.* v. *Southern Wood Preserving Company*, 135 F. 2d 606, 607 (C. C. A. 5); *N. L. R. B.* v. *Century Projector Corporation*, 141 F. 2d 488, 489 (C. C. A. 2).

could find such an act, during a period of rivalry between competing unions, and under the circumstances, to be reasonably calculated to indicate the company's preference and to be a violation of the obligation of neutrality." *Elastic Stop Nut Corporation* v. *N. L. R. B.,* 142 F. 2d 371, 380 (C. C. A. 8). *A fortiori,* where, as here, the employer enters into a collective-bargaining agreement with a union which has been repudiated at the polls after the conclusion of the electoral contest in derogation of the union which was the victor in that contest, it is perfectly plain that the contract is the unlawful fruition of the grossest sort of employer partisanship.

Active support of the A. F. L. did not stop with the execution of the closed-shop agreement. In conjunction with the corporation president's announcement to the employees of the transfer of facilities from the corporation to the partnership, he stressed to them the increased wage rates which the employees would receive, and promised that the corporation would add to the January wages of the employees the difference between the two wage scales, to be paid to those employees who continued in the partnership's employ during the ensuing month of February (*supra,* p. 30). Clearly, since continuance in the partnership's employ required membership in the A. F. L. in accordance with the closed-shop agreement, this supplemental wage inducement was direct financial support to the A. F. L. in order to foster membership in it and defection from the C. I. O.

The grant of a monetary reward by an employer to his employees to induce them to abandon one union and adopt another is an intrusion of the employer's economic power in its most palpable form. It is of whole cloth with an employer's effort in a single union situation to induce his employees "by the grant of wage increases to leave the union" which the Supreme Court held constituted interference with the exercise of the rights guaranteed to employees under Section 7 of the Act. *Medo Photo Supply Corporation* v. *N. L. R. B.,* 321 U. S. 678, 685. In support of its conclusion, the Supreme Court cited *N. L. R. B.* v. *Falk Corp.,* 308 U. S. 453, 460–461, in which, through a company-dominated union, an aggravated form of an assisted union, the employer sought to thwart the organizational drives of legitimate labor organizations by the premature grant of a wage increase. The Supreme Court in the *Medo* case went on to say that "there could be no more obvious way of interfering with these rights of employees than by grants of wage increases upon the understanding that they would leave the union in return" (321 U. S. at 686).[16] Moreover, the gravity of the offense in this case is compounded by the fact that the supplemental wage in-

[16] See also, *S. H. Camp and Company* v. *N. L. R. B.*, 160 F. 2d 519 (C. C. A. 6) (joint announcement by the employer and one union of wage increases during pendency of an election between rival uions). *N. L. R. B.* v. *Elyria Telephone Company*, 158 F. 2d 868 (C. C. A. 6) (announcement by the employer of wage increases, without credit to union for its part in securing them, undercuts the authority of the union).

ducement was granted without consultation with the certified bargaining agent and in derogation of its authority.[17]

D. The respects in which the employer's utterances are coercive

Thus far we have considered the course of the unfair labor practices in this case in isolation from the preelection speech of November 20 and the postelection speech of November 27, delivered by O'Keefe, the corporation's president, which the Board found to be coercive in character (*supra,* pp. 12–13, 14–17). In order to insulate from consideration and appropriate remedial action the coercive aspects of their verbal conduct, respondents "cloak [themselves] in the raiment of the First Amendment to the Federal Constitution,"[18] and, since the amendments to the Act, in their answer to the Board's petition for enforcement (R. I, 215), they invoke as well the provisions of Section 8 (c) of the Act, as amended, which prescribe the permissible limits of employer utterance. Because the Board's order as it relates to respondents' verbal conduct, which the Board has recommended be modified to conform to the statutory language of Section 8 (c) (*supra,* p. 33), operates prospectively to regulate future employer behavior, it is appropriate to determine whether the utterances which form the basis for the order fall within the interdiction of the

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[17] *May Department Stores* v. *N. L. R. B.*, 326 U. S. 376, 381–386; *Medo Photo Supply Corp.* v. *N. L. R. B.*, 321 U. S. 678, 684–685; *N. L. R. B.* v. *Winona Textile Mills*, 160 F. 2d 201, 209 (C. C. A. 8).

[18] *R. R. Donnelly & Sons Company* v. *N. L. R. B.*, 156 F. 2d 416, 419 (C. C. A. 7), cert. denied, 329 U. S. 810.

standard expressed in Section 8 (c).[19] Clearly, however, under Section 8 (c) "Employers still may not, under the guise of merely exercising their right of free speech, pursue a course of conduct designed to restrain and coerce their employees in the exercise of rights guaranteed them by the Act";[20] nor does "the guaranty of freedom of speech contained in the First Amendment * * * guarantee him who speaks immunity from the legal consequences of his verbal actions."[21]

1. The standard expressed in Section 8 (c)

Section 8 (c) of the Act, as amended, provides that:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

In interdicting utterances which contain a "threat of reprisal or force or promise of benefit," Congress

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[19] *N. L. R. B.* v. *Sandy Hill Iron & Brass Works*, 165 F. 2d 660, 662 (C. C. A. 2); *L. A. Young Spring and Wire Corp.* v. *N. L. R. B.*, 163 F. 2d 905, 907 (App. D. C.), cert. denied, 333 U. S. 837.

[20] *N. L. R. B.* v. *Gate City Cotton Mills*, 167 F. 2d 647, 649 (C. C. A. 5).

[21] *N. L. R. B.* v. *Blatt Company*, 143 F. 2d 268, 274 (C. C. A. 3), cert. denied, 323 U. S. 774.

summarizes the abuse to be feared from employer persuasion which arises from the economic hold which an employer exerts over his employees. The measure of the right to speak is therefore struck at that point where the utterances assume overtones of compulsion or favor derived from an attempt, openly or covertly, to bulwark persuasion by economic power. "The use of economic power over men and their jobs to influence their action is more than the exercise of freedom of speech. Mere suggestions, when made by one who holds the power of economic coercion in a setting conducive to the exercise of that power, may have the unwarranted effect of exerting a coercive influence to which freedom of speech does not extend." *N. L. R. B.* v. *Continental Oil Company,* 159 F. 2d 326, 330 (C. C. A. 10).[23] In consequence, "pressure exerted

[23] Compare the concurring opinion of Mr. Justice Douglas, in which Mr. Justice Black and Mr. Justice Murphy joined, in *Thomas* v. *Collins*, 323 U. S. 516, 543–544: "No one may be required to obtain a license in order to speak. But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment." The necessity for reconciling the ambivalent character of employer speech has found frequent expression of which the opinion in *Continental Box Co.* v. *N. L. R. B.*, 113 F. 2d 93, 97 (C. C. A. 5) is illustrative: "The employer has the right to have and to express a preference for one union over another so long as that expression is the mere expression of opinion in the exercise of free speech and is not *the use of economic power to coerce, compel or buy* the support of the employees for or against a particular labor organization." [Emphasis supplied.]

vocally by the employer may no more be disregarded than pressure exerted in other ways." *N. L. R. B.* v. *Virginia Electric & Power Company,* 314 U. S. 469, 477. For although "employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty, * * * when to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed." *Thomas* v. *Collins,* 323 U. S. 516, 537–538; *May Department Stores* v. *N. L. R. B.,* 326 U. S. 376, 386. Thus, in proscribing utterances which contain "threats of violence, intimation of economic reprisal, or offers of benefit" (S. Rep. No. 105, 80th Cong., 1st Sess., 23), Section 8 (c) in its substantive aspect, as explained by Senator Taft, chief sponsor of the legislation, "in effect carries out approximately the present rule laid down by the Supreme Court of the United States. It freezes that rule into the law itself. * * *" 93 Cong. Record 3837.

In order to accomplish its remedial objective, which is to "insure both to employers and labor organizations full freedom to express their views to employees on labor matters" within noncoercive limits (S. Rep. No. 105, 80th Cong., 1st Sess., 23), Section 8 (c) is designed to preclude a practice whereby utterances are condemned as coercive, or are considered as evidence, because of the commission of other unfair labor practices, remote in time and unconnected by

circumstances to the utterances. Thus as explained by the House Report, "if an employer criticizes a union, and later a foreman discharges a union official for gross misconduct," the Board may not " 'infer,' from what the employer said, *perhaps long before,* that the discharge was for union activity." (H. Rep. No. 245, 80th Cong., 1st Sess., 33.) [Emphasis supplied.] As stated in the Senate Report, the Board may not hold "speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, *even though severable or unrelated.*" S. Rep. No. 105, 80th Cong., 1st Sess., 23. [Emphasis supplied.] "The necessity for this change in the law," explained the House Conference Report, was to prevent "using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, *no matter how irrelevant or immaterial,* that some later act of the employer had an illegal purpose." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 45. [Emphasis supplied.] The ultimate evolution of Section 8 (c) had its origin in the need, as succinctly stated by Senator Ellender, one of the conferees, of precluding the condemnation of "a *casual* speech," "*no matter how remote or how separable,*" as "a part of the pattern of unfair labor practices." [Emphasis supplied.] 93 Cong. Record 4137. Giving effect to these views, the Board holds that an employer's statements which contain no threat of coercion "do not acquire a coercive character be-

cause the [employer] had on another occasion committed unfair labor practices." [24]

The remedial objective of Section 8 (c) does not, however, preclude the consideration of circumstances connected with and relevant to the utterance in order to determine its meaning. Whether words import a "threat of reprisal or force or promise of benefit" cannot be determined in isolation from the setting in which they are uttered, for, as Mr. Justice Holmes observed, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." [25] Consideration of the legislative evolution of Section 8 (c) confirms this view. Section 8 (d) (1) of the House bill provided that "the following shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act: Expressing any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, if it does not *by its own terms* threaten force

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[24] *Matter of Mylan-Sparta Co., Inc.*, 78 N. L. R. B. No. 161, 22 L. R. R. M. 1317; *Matter of Tygart Sportswear Co.*, 77 N. L. R. B. 613, 22 L. R. R. M. 1052; *Matter of Bailey Company*, 75 N. L. R. B. 941. The further objective of Section 8 (c), to eliminate the "compulsory audience" doctrine, that an employer's speech is coercive because the employees were ordered by the employer to listen to it (S. Rep. No. 105, 80th Cong., 1st Sess., 23), has likewise been effected. *Matter of Babcock & Wilson Co.*, 77 N. L. R. B. No. 96; 22 L. R. R. M. 1057, 1058.

[25] *Towne* v. *Eisner*, 245 U. S. 418, 425.

or economic reprisal." [Emphasis supplied.][26] Section 8 (c) of the Senate bill provided that "The Board shall not base any finding of unfair labor practice upon any statement of views or arguments, either written or oral, if such statement contains *under all the circumstances* no threat, express or implied, of reprisal or force, or offer, express or implied, of benefit."[27] [Emphasis supplied.] Because in conference Section 8 (c) in its final form was avowedly evolved, as is apparent from its wording, from the House provision and in substitution for the Senate provision,[28] the additions to and deletions from the House provision are of the utmost significance in ascertaining the meaning to be ascribed to the final form of the section. Apart from the addition of "promise of benefit" within the category of interdicted utterances, the single significant change in the House provision was the deletion of the phrase "by its own terms." The clear inference from this deletion is to signify recession from the view that the meaning of utterances was to be determined by consideration of the bare words alone without reference to the extrinsic circumstances integrally involved in their utterance. This interpretation is unimpaired by the failure to include in Section 8 (c) in its final form

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[26] Legislative History of the Labor Management Relations Act, 1947, Gov't. Print. Off., 1948, p. 183.

[27] *Id.* at p. 242.

[28] H. Conf. Rep. No. 510. 80th Cong., 1st Sess. 45; 93 Cong. Record 6443; 93 Cong. Record. 6859.

the phrase, "under all the circumstances," contained in the Senate provision. Explaining the conference agreement, Senator Taft stated that that phrase was deemed "ambiguous and might be susceptible of being construed as approving certain Board decisions which have attempted to circumscribe the right of free speech where there were also findings of unfair labor practices" (93 Cong. Record 6443); in short that the phrase might invite reintroduction of the practice of condemning utterances as coercive because of the commission of other unfair labor practices remote in time and unconnected by circumstances to the utterances (93 Cong. Record 6859–6860). During the debate, in response to a query whether statements may be considered in relation to acts to determine meaning, Senator Taft went on to explain, "All these questions involve a consideration of the surrounding circumstances. It would depend upon the facts. * * * There would have to be * * * circumstances to tie in with the act of the employer" (93 Cong. Record 6446.) Consequently, where a relevant factual nexus exists between expression and conduct, the meaning of the statement may be ascertained in relation to the circumstances of its utterance. As an objective observer concluded, "Section 8 (c) itself contains nothing to suggest that in determining the presence of a threat or promise the Board is to shut its eyes to extrinsic circumstances and look only to the naked words. In the labor field, as elsewhere, language

takes on its meaning from its context." Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 1, 17 (1947).

2. The application of the standard expressed in Section 8 (c) to the utterances in this case

In the light of these criteria, we turn to consider the coercive character of the preelection speech of November 20 and the postelection speech of November 27 delivered by O'Keefe, the corporation's president. These speeches are inseparably interwoven verbal complements of respondents' course of nonverbal unfair conduct. The post-election speech inaugurated the campaign to induce a state of employee opinion in the plant which would acquiesce in the employer's substitution of the A. F. L. for the C. I. O. as the bargaining representative. It was designed to instill in them fear for their job security if adherence to the C. I. O. continued, to impair the employees' confidence in their recently designated representative, and to lull them into acceptance of the impending scheme by which the Board's certification of the C. I. O. would be bypassed and the obligation to bargain collectively avoided through the arrangement between the corporation and the partnership which the speech plainly presaged. Similarly, the preelection speech was the capstone of the corporation's comprehensive participation in the electoral campaign on behalf of the A. F. L. The economic assistance rendered the A. F. L. in the form of donations of the services of its employees and the

free use of its plant property for electioneering purposes was bulwarked by the representation that the job security of the employees with the corporation and in the industry and the continued prosperity of the corporation were dependent on the selection of the A. F. L. as bargaining agent.

Entirely aside from the sharp meaning which the speeches acquire when interpreted in relation to the circumstances integrally involved in their utterance, the preelection and postelection speeches are on their face coercive in character. In the postelection speech (*supra,* pp. 14–17), O'Keefe called the employees "the dumbest clucks in the world," albeit through the transparent device of quoting another person. He mentioned by name four C. I. O. employees, adverted to the corporation's past favors to them, implied that they were ungrateful, and concluded that he found it difficult to believe that they, and the other C. I. O. employees, "wished to work a hardship on the rest." The repressive character of the speech, marked by this public denunciation of named employees for their union affiliation, is further illustrated by O'Keefe's statement that "the future looked brighter than it ever did since we have been in business" until the choice of the C. I. O. as bargaining agent threw "a curtain that makes things darker than they have ever been." So dark indeed that two of the officers were so discouraged with the prospect of dealing with the C. I. O. that they wanted "to sell out." This augury of disaster was predicated upon an asserted fear that

an A. F. L. boycott would be invoked against the corporation's products by virtue of the employees' choice of the C. I. O. as their representative, a boycott which since 1937 had evidently not succeeded in impairing the corporation's continued prosperity. O'Keefe concluded that in order to avoid the consequences of the employees' improvident choice of the C. I. O., it would be necessary either to "contract enough of our labor to a firm with an A. F. of L. contract, in order that they would take us off the unfair sheet—or to take advantage of the possibilities to sell this business to some one who has an A. F. of L. organization." Similarly, the preelection speech stressed the theme that the prosperity of the corporation and the job security of the employees both with the company and in the industry in general depended on the selection of the A. F. L. as bargaining representative (*supra,* pp. 12–13).

The two speeches exploited the employees' fear for their job security in order to induce conduct in accord with the corporation's wishes. No more effective means of coercing the employee's judgment is available than the exploitation of his sensitivity to the need for retaining his job. Assertions by employers that by their own act as a consequence of unionization plant operations would be partially or wholly liquidated with a resulting curtailment of job opportunities have been uniformly condemned.[29] They are "tantamount

[29] *N. L. R. B.* v. *Polson Logging Company*, 136 F. 2d 314 (C. C. A. 9); *N. L. R. B.* v. *Pacific Gas & Electric Company*, 118 F. 2d 780, 788 (C. C. A. 9); *N. L. R. B.* v. *Cowell Portland Cement Co.*, 148

to a threat of loss of employment." *N. L. R. B.* v. *New Era Die Co., Inc.,* 118 F. 2d 500, 505 (C. C. A. 3). As succinctly expressed by the Court of Appeals for the Sixth Circuit in *Atlas Underwear Co.* v. *N. L. R. B.,* 116 F. 2d 1020, 1023 (C. C. A. 6):

> A statement to the employees * * * that it might be necessary to close the plant, made during a period when unionization of its employees was sought to be effected, must be regarded as coercive, notwithstanding sincere belief on the part of the petitioner's executives that such result would of necessity follow. *N. L. R. B.* v. *Asheville Hosiery Co.,* 4 Cir. 108 F. 2d 288. While a bona fide shut-down of a plant does not of itself constitute a violation of the Act, undoubtedly a threat or prediction that it might have to close, if unionized, must necessarily affect the judgment of its employees and interfere with their freedom of choice.

An appreciation of the gravity of the corporation's infraction of duty arising from the postelection speech, in its attempt to secure defection from the C. I. O. as bargaining agent by the threats to the employees' job security, is most strikingly high-lighted when considered in relation to the binding effect of the certification on the employees themselves. Employees who have designated a bargaining representa-

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F. 2d 237, 243 (C. C. A. 9); *N. L. R. B.* v. *Winona Textile Mills, Inc.*, 160 F. 2d 201, 205, 206–207 (C. C. A. 8); *N. L. R. B.* v. *Kopman-Woracek Shoe Mfg. Co.*, 158 F. 2d 103, 105 (C. C. A. 8); *N. L. R. B.* v. *Crow Bar Coal Co.*, 141 F. 2d 317, 318 (C. C. A. 10); *N. L. R. B.* v. *Van Deusen*, 138 F. 2d 893, 895 (C. C. A. 2); *N. L. R. B.* v. *American Pearl Button Co.*, 149 F. 2d 311, 316 (C. C. A. 8); *N. L. R. B.* v. *Sunbeam Electric Manufacturing Co.*, 133 F. 2d 856, 860 (C. C. A. 7).

tive through an election conducted under Board auspices are in ordinary circumstances bound to their choice for a reasonable period, usually one year.[30] The justification for precluding the revocation of the union authority rests, as the Supreme Court has held, upon the recognition that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Frank Bros. Company* v. *N. L. R. B.,* 321 U. S. 702, 705. The "power to hold the employees to their choice for a season," based on the necessity for stability in bargaining relations in order to enhance the likelihood that the collective bargaining process will succeed, has been uniformly acknowledged.[31] Despite O'Keefe's own recognition that the employees could not even of their own volition revoke the authority of the C. I. O.—"Now I realize that the election is over—you have voted C. I. O. Even if you changed your minds tomorrow, we could not have another election for at least 6 months and maybe a year" (*supra,* p. 16)—he nevertheless sought to destroy the effectiveness of a bargaining relationship barely one week old. Under the circumstances, O'Keefe's exhortations are no more an exercise of the right of free speech

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[30] N. L. R. B. Twelfth Annual Report (Gov't Print. Off., 1948), p. 33.

[31] *N. L. R. B.* v. *Century Oxford Manufacturing Corporation*, 140 F. 2d 541, 542 (C. C. A. 2); *N. L. R. B.* v. *Appalachian Electric Power Co.*, 140 F. 2d 217, 221–222 (C. C. A. 4); *N. L. R. B.* v. *Botany Worsted Mills*, 133 F. 2d 876, 881–882 (C. C. A. 3); *N. R. L. B.* v. *Blair Quarries, Inc.*, 152 F. 2d 25 (C. C A. 4); *N. L. R. B.* v. *Gatke Corp.*, 162 F. 2d 252 (C. C. A. 7).

than are the "verbal acts" of a contemnor who seeks to induce defiance of a court's decree,[32] or those of a tortfeasor who seeks to induce a breach of contract or the disruption of advantageous relations.[33]

The Board was fully warranted in concluding that the warnings to the employees that their job security depended upon the establishment of the A. F. L. and the displacement of the C. I. O. as bargaining agent carried a coercive import which vitiated the pre-election and post-election speeches. Although a "prophecy that unionization will ultimately lead to loss of employment is not coercive where there is no threat that the [employer] will use its economic power to make its prophecy come true,"[34] where, as here, the employer threatens "to sell out," "to contract enough of our labor to a firm with an A. F. L. contract," "to take advantage of the possibilities to sell this business to some one who has an A. F. L. organization" (*supra,* pp. 16–17), he proposes the utilization of his own economic power upon his own initiative to evoke an image of economic disaster designed to stampede the employees' judgment. The subject matter of job security in the hands of individuals who have the economic power over the jobs of their audience is so fraught with dangers of abuse that the Board is

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[32] *Gompers* v. *Bucks Stove & Range Company*, 221 U. S. 418, 435–439.

[33] *Lumley* v. *Gye*, 2 E. & B. 216 (Q. B. 1853); Restatement, Torts, Chapter 37, Topic 2, Inducing Breach of Contract or Refusal to Deal.

[34] *Matter of Mylan-Sparta Co., Inc.*, 78 N. L. R. B. No. 161; 22 L. R. R. M. 1317.

entitled closely to scrutinize the utterances to determine whether the right of free speech is being corrupted to obtain an unlawful end. In the discharge of its function "to decide upon the evidence" the coercive character of utterances, the Board's finding of fact, that respondents' verbal conduct was coercive, is so clearly supported by substantial evidence that it is not open to successful challenge on this record.[35]

[35] *N. L. R. B.* v. *Virginia Electric & Power Company*, 314 U. S. 469, 479; *N. L. R. B.* v. *Bird Machine Co.*, 161 F. 2d 589 (C. C. A. 1); *N. L. R. B.* v. *Trojan Powder Co.*, 135 F. 2d 337, 338–339 (C. C. A. 3); *N. L. R. B.* v. *American Laundry Machinery Co.*, 152 F. 2d 400, 401 (C. C. A. 2); *Peter J. Schweitzer* v. *N. L. R. B.*, 144 F. 2d 520, 524–525 (App. D. C.); *N. L. R. B.* v. *Pick Mfg. Co.*, 135 F. 2d 329, 331 (C. C. A. 7); *N. L. R. B.* v. *Peterson*, 157 F. 2d 514 (C. C. A. 6), cert. denied, 67 S. Ct. 979. We are not unmindful of those decisions by some Circuit Courts of Appeals which apparently regard a finding of coercion based upon employer utterances as open to independent judicial determination. *N. L. R. B.* v. *Continental Oil Company*, 159 F. 2d 326, 329 (C. C. A. 10); *N. L. R. B.* v. *J. L. Brandeis & Sons*, 145 F. 2d 556, 563 (C. C. A. 8); *Jacksonville Paper Company* v. *N. L. R. B.*, 137 F. 2d 148, 150 (C. C. A. 5), cert. denied, 320 U. S. 772. Compare, however, the opinion of the Eighth Circuit in *N. L. R. B.* v. *J. L. Brandeis & Sons*, 145 F. 2d 556, 564 (C. C. A. 8) that such a determination "is a question of law" with its own previous opinions that "the determination of the category into which the remarks fell was a question of fact for the Board, *N. L. R. B.* v. *Virginia Power & Electric Co.*, [314 U. S. 469], and the Board's finding on the fact may not be disturbed." *Elastic Stop Nut Corp.* v. *N. L. R. B.*, 142 F. 2d 371, 378 (C. C. A. 8); *N. L. R. B.* v. *Laister-Kauffman Aircraft Corp.*, 144 F. 2d 9, 17 (C. C. A. 8); *Gamble-Robinson Co.* v. *N. L. R. B.*, 129 F. 2d 588, 591 (C. C. A. 8). Compare also the opinion of the Fifth Circuit in *Jacksonville Paper Company* v. *N. L. R. B.*, 137 F. 2d 148, 150 (C. C. A. 5) with its own previous opinion that where "reasonable minds could fairly have differed" concerning the import of statements, "the findings of the Board in this respect as in the others, must be accepted as substantially supported. * * *" *Continental Box Company, Inc.* v. *N. L. R. B.*, 113 F. 2d. 93, 97 (C. C. A.

II. The certification of the C. I. O. as the exclusive bargaining representative of the employees in an appropriate unit was based upon the free choice of the employees as reflected by a validly conducted election

In order to properly appraise the validity of certain objections raised concerning the propriety of the certification of the C. I. O., it is necessary to state in some detail the circumstances involved in the execution of the consent election agreement and in the conduct of the election.

A. The arrangement for a consent election

Following the filing of a Petition for Certification of Representatives by the C. I. O. on October 23, 1945 (R. I, 74; II, 750–751), three informal conferences were held to discuss the petition at the Board's Regional office in Los Angeles on November 5, 13, and 14, 1945, attended by representatives of the vari-

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5). The assumption that the fact finding function of the Board in relation to vocal coercion is more restricted than its function in relation to non-vocal coercion is at odds with the province assigned the Board in the Supreme Court's decision in *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 479. "* * * The question of how deeply an employers' relations with his employees will overbear their will "is the sort of problem" to decide which a board, or tribunal chosen from those who have had long acquaintance with labor relations, may acquire a competence beyond that of any court." *N. L. R. B.* v. *Standard Oil Company*, 138 F. 2d 885, 887 (C. C. A. 2). It may not be assumed that an administrative agency as an organ of the federal government will be any less zealous to guard the right of free speech than will other branches of the federal government. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 146.

ous A. F. L. unions,[36] the C. I. O., and the corporation (R. III, 967–968, 972). At the first conference, the composition of the unit and the feasibility of a consent election were discussed (R. II, 758–862, R. III, 956–959). The corporation objected to an election in which each of the craft groups in the plant would vote in separate units to determine whether they desired to be represented by the particular A. F. L. union concerned or the C. I. O. (or neither), thus opening the possibility that some of the employees in the plant would be represented by the A. F. L. and others by the C. I. O. (R. II, 760–761, R. III, 959). In order to obviate this objection, it was suggested, and subsequently agreed, that the A. F. L. unions would be designated on the ballot as Los Angeles Metal Trades Council, A. F. of L., and voted on as a single unit (R. II, 760–761, R. III, 959).[37] At the second conference, further details were ironed out (R. III, 968–972). At the third conference on the next day, November 14, an Agreement For

[36] Present at the first conference were representatives of the Stove Mounters, Carpenters, and Teamsters (R. III, 956). Present at the second conference were representatives of the Metal Trades Council of the A. F. L., Carpenters, I. A. M., Teamsters, Moulders, and the Stove Mounters (R. III, 969). Present at the third conference was a representative of the I. A. M., acting on behalf of the Metal Trades Council, A. F. L. (R. III, 972, 971, 978).

[37] This was in accord with a statement of Roberts of the Stove Mounters during a meeting in Collins' office between Collins and the various A. F. L. unions in the latter part of October 1945, at which time Roberts stated that up to the date of the election the plant would be treated as a single entity, but thereafter it would be divided in accordance with the jurisdiction of the various A. F. L. unions (R. I, 454–455, 440–442).

Consent Election was entered into, providing for an election to be held on November 20, 1945, among the employees in a unit described as "all production and maintenance employees excluding office clerical employees; guards, parcel post clerks; draftsmen; timekeepers; material expediters; pattern makers and pattern maker helpers other than those working in sheet metal; experimental laboratory workers; and supervisory employees," at which the employees would be given the opportunity to vote for the C. I. O., the Los Angeles Metal Trades Council, A. F. of L., or neither (R. I, 75; R. III, 971–978).[38]

[38] Although not a matter of record, it may be noted that subsequent to the execution of the consent election agreement on November 14, 1945, a communication from the American Federation of Labor Executive Council to the national organization of the I. A. M., dated November 19, 1945, effected the disaffiliation of the I. A. M. from the A. F. L. (Machinists Monthly Journal, January 1946, p. 17). Although they have not sought intervention in this proceeding to resist enforcement of the Board's order, on the basis of disaffiliation, the A. F. L. affiliates contended before the Board that the consent election agreement was not binding on them because signed on their behalf by a representative of the I. A. M. Clearly, however, the status of the I. A. M. as an affiliate of the A. F. L. on November 19 has no bearing on its authority to act on behalf of the A. F. L. unions on November 14. At the second conference at the Board's Regional Office on November 13, 1945, it was agreed among the A. F. L. unions that a representative of the I. A. M. would sign the consent election agreement in their behalf (R. III, 971). The consent election agreement was executed on the next day in accordance with that understanding (R. I, 75, n. 10; R. III, 978, 973–978), and the A. F. L. unions thereafter participated in the election on November 20 (*infra*, pp. 66–68). Subsequent thereto, the I. A. M. and the A. F. L. unions continued to cooperate with each other, and they were joint signatories to the closed-shop agreement executed with the partnership (R. IV, 1732–1734, 1723–1738). This continued cooperation was in accord with a directive of John B. Frey, presi-

B. The conduct of the election

The election resulting in the certification of the C. I. O. as the exclusive representative of the employees was conducted with uneventful regularity. Four days before the election, sample ballots were posted in conspicuous places throughout the plant (R. III, 1220–1224). The C. I. O., the A. F. L., and the corporation each chose two authorized observers to assist in the conduct of the election under the supervision of the Board's agents. Charles Spallino and John Lovasco acted on behalf of the A. F. L. (R. III, 1002). The six observers were divided into two teams, each team composed of one observer for each organi-

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dent of the Metal Trades Councils, A. F. L., who by letter dated January 28, 1946, instructed the local A. F. L. unions as follows:

"* * * under the jurisdiction of most Metal Trades Councils there are joint agreements with employers which include local unions of the International Association of Machinists. These agreements were entered into in good faith by the employers, and that good faith must be preserved. The Executive Council of the Metal Trades Department, for this valid reason, holds that the dissociation of the International Association of Machinists in no way invalidates these contracts, and that during the life of such joint agreements which includes local unions of the International Association of Machinists, the contract will be held as valid as though the International Association of Machinists had not been dissociated. In other words, such agreements are now in full force and effect, binding upon the local Metal Trades Councils, and equally binding upon the local unions of the International Association of Machinists (Machinists Monthly Journal, March 1946, p. 52)."

And by letter dated February 7, 1946, he stated:

"The dissociation of the International Association of Machinists is not intended to place any difficulty in the matter of jointly negotiating agreements with employers. (Machinists Monthly Journal, March 1946, p. 52)."

Consequently, for the purposes of this case, the formal status of the I. A. M. as an affiliate of the A. F. L. is irrelevant.

zation (R. III, 998–999, 1007–1008, 1010, R. IV, 1405–1410). The list of eligible voters, previously prepared by the personnel manager of the corporation in accordance with the agreement for consent election, was likewise divided into two parts in alphabetical order, A through K and L through Z (*ibid.*, R. IV, 1694–1703, R. III, 1217–1218). Each employee desiring to cast a ballot presented himself to one or the other of the teams of observers, depending upon the alphabetical designation of his name, and was checked off against the eligibility list (*ibid.*). At the conclusion of the balloting, each observer certified "that such balloting was fairly conducted, that all eligible voters were given an opportunity to vote their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote" (R. III, 1002).

The tabulation of the ballots was conducted under the scrutiny of observers for the corporation, the A. F. L. and the C. I. O., who were persons other than those who acted as observers in the conduct of the election (Cf. R. III, 1227 with R. III, 1002). The results of the tabulation were recorded in a Tally of Ballots which shows that of the 341 eligible voters, 2 cast void ballots, 177 voted for the C. I. O., 114 voted for the A. F. L., and 5 voted for neither (R. I, 75; R. III, 1226–1227). The Tally of Ballots contains the following certification signed by the C. I. O., the A. F. L., and the corporation observers. "The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and

accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this Tally" (R. III, 1227).

On November 28, 1945, no objections to the conduct of the ballot having been filed within five days of the service of the Tally of Ballots as prescribed by the terms of the consent election agreement (R. III, 976), the Regional Director issued a Consent Determination of Representatives, herein called the certification, in which he found and determined that the C. I. O. was the exclusive representative of the employees within the appropriate unit (R. I, 75, 87; R. III, 1229–1230).[39]

C. The propriety of the Board's conclusion that the election was properly conducted

Notwithstanding the demonstrable regularity of the electoral procedures followed in ascertaining the

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[39] Without previously intimating any objection thereto, the A. F. L. contended during the course of the hearing, although it has not sought intervention in this proceeding to resist enforcement of the Board's order, that the results of the election were not representative of the true wishes of the employees, because the A. F. L. was designated on the ballot as Los Angeles Metal Trades Council, A. F. L., rather than in the names of the individual craft unions. The A. F. L. had however agreed to the form of the ballot precisely as it appeared, and it may be safely assumed that it fully publicized the purport of the ballot to the prospective voters. There is no evidence in the record that the employees were in any way misled. The Supreme Court's conclusion in *May Department Stores* v. *N. L. R. B.*, 326 U. S. 376, 380–381, with respect to a comparable objection to the form of the ballot is equally applicable here: "In the circumstances of this election, we see no basis for the Company's objection to the certified representative on the ground of possible confusion of the employees."

wishes of the employees, the employer and the A. F. L. sought to impeach the results of the election. They relied upon a statement made during the course of the hearing by Charles Spallino, one of two observers for the A. F. L. during the election, that he had "been C. I. O. at heart all the time" and that he had not been acting "in good faith" for the A. F. L. (R. I, 87–88; R. III, 1037; R. II, 604). They contended that the election is thereby vitiated.

Their contention is, however, purely speculative since the record discloses no evidence that Spallino's objective conduct as an observer in any wise prejudiced the fairness of the election. Spallino with two others made up one of the two teams of observers (R. III, 998–999, 1007–1008, 1010, R. IV, 1405–1410). He was seated at a table flanked on either side by an observer for the C. I. O. and the corporation (*ibid.*). Because of his greater familiarity with the corporation's employees, he marked the portion of the eligibility list entrusted to his team (*ibid.*). The eligibility list was, however, available to the other two observers, who, as occasion warranted it, checked the list (*ibid.*). There is no showing that Spallino did not carry out his task as an observer with absolute honesty, or that he in any way hindered the conduct of the election. The complete failure of proof of objective misconduct is further borne out by the fact that no objection to the conduct of the election was in any way intimated by any of the parties until the hearing in the unfair labor practice proceedings nearly four months after the election, although the terms of

the consent election agreement [40] and the rules of the Board then in force [41] provide that the parties shall file objections to the conduct of the election with the Board within five days of the election. Failure to file objections with the Regional Director within the time allotted, in itself a sufficient reason for the Board to decline to examine into the merits of the belated objection,[42] demonstrates that the A. F. L. and the corporation observed no overt manifestations of misconduct which they themselves deemed meritorious, despite the fact that the results of the election went against their wishes.

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[40] "Objections to the conduct of the ballot, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within 5 days after the issuance of the Tally of Ballots" (R. III, 976).

[41] "* * * Upon the conclusion of such election, the designated agent shall cause to be furnished to the parties a Tally of Ballots. Within five (5) days thereafter, the parties may file with the designated agent an original and three copies of Objections to the conduct of the election or conduct affecting the results of the election." National Labor Relations Board, Rules and Regulations, Series 3, as amended, effective July 12, 1944, Section 10. The present rules are to the same effect. Sec. 203.61, Rules and Regulations, Series 5.

[42] *N. L. R. B.* v. *A. J. Tower Co.*, 329 U. S. 324. In that case the Supreme Court upheld the Board's refusal to consider a challenge to the eligibility of a voter to participate in a Board election when the challenge is not made at the time the ballot is cast. The Court observed that "the Board's prohibition of post-election challenges * * * gives a desirable and necessary finality to elections, yet affords all interested parties a reasonable period in which to challenge the eligibility of any voter" (329 U. S. at 332–333). The Court noted that objections to the election as distinguished from challenges to a ballot "relate to the working of the election mechanism and to the process of counting the ballots accurately and fairly" (329 U. S. at 334). In the case of objections, the Board authorizes a five-day period during which they may be filed.

Consequently, the A. F. L.'s contention reduces itself to a complaint that because of its subsequent discovery of Spallino's subjective attitude it would not have selected him to act as its observer, a matter wholly irrelevant to whether the election was properly conducted, and the employer's contention stands on the even more tenuous ground that it is surrogate to the A. F. L.'s grievance. "Whether either the company or the union or the employees opposed to the union are represented at the polls by observers is a matter exclusively within the discretion of the Board." *Semi-Steel Casting Company* v. *N. L. R. B.* 160 F. 2d 388, 393 (C. C. A. 8); *N. L. R. B.* v. *Worchester Woolen Mills Corp.* (C. C. A. 1), decided October 4, 1948. In exercising the privilege accorded by the Board, the selection of an observer later deemed to have been an improvident choice is no cause for ignoring the results of a fairly conducted election. Accordingly, the Board's conclusion that the facts do not justify setting aside the election is an appropriate exercise of the "wide degree of discretion" entrusted to it "in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by

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Failure to adhere to the prescribed time limit, upon the principle enunciated in the *Tower* case, forecloses a consideration of the objections on the merits, since an unlimited opportunity to object "would tempt a losing union or an employer to make undue attacks * * * so as to delay the finality and statutory effect of the election results." 329 U. S. at 332; *Wilson Athletic Goods Mfg. Co.* v. *N. L. R. B.*, 164 F. 2d 637, 640 (C. C. A. 7); National Labor Relations Board, Tenth Annual Report, (Gov't. Print. Off., 1946), p. 25, n. 58.

employees" *N. L. R. B.* v. *A. J. Tower Company,* 329 U. S. 324, 330.

The Board properly found, in accordance with the agreement of the parties manifested in the consent election agreement, that the production and maintenance employees at the corporation's Los Angeles plant, excluding certain job classifications, constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act (R. I, 88). It further properly found, in accordance with the results of the consent election, that the C. I. O. was the exclusive bargaining representative of the employees in the unit (R. I, 88–89), and that the corporation and the partnership as the employer of these employees, by refusing to bargain with such representatives had violated Section 8 (5) of the Act and that the course of conduct pursued by them to evade their obligation interfered with and coerced the employees in violation of Section 8 (1).

III. The Board's order is valid and proper

Recognizing that their employees were intent upon some form of unionization, the corporation and the partnership in this case sought to channel the employees' choice in a direction which would suit their business convenience, and resorted to the commission of unfair labor practices in order to achieve their end. Unlike other cases which have come before the courts, this case did not involve the present imposition of economic hardships upon the employer which induced a desperate resort to infractions of statutory duties in order to obtain relief from an actual state of distress. In either event, it is well-settled that "the

act prohibits unfair labor practices in all cases. It permits no immunity because the employer may think that the exigencies of the moment require infraction of the statute. In fact, nothing in the statute permits or justifies its violation by the employer."[43] Therefore, in order to dissipate the effects of the unfair labor practices, the Board shaped a remedy appropriate to the circumstances.

A. The propriety of the order requiring both the corporation and the partnership to bargain with the C. I. O.

The heart of the Board's order is the requirement that the corporation and the partnership bargain collectively with the C. I. O. as the representative of the production and maintenance employees at the Los Angeles plant. The primary objective which respondents sought to accomplish through the unfair labor practices perpetrated in this case was avoidance of the obligation to bargain with the C. I. O. The single means by which to reach and nullify that objective is an order requiring respondents to bargain in accordance with the certification. A remedy which accomplishes less is not only a partial and unsatisfactory solution, but, in effect, concedes success to the unlawful plan. It is within the Board's competence to avoid that result and to achieve a full rectification of the unfair labor practices.

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[43] *N. L. R. B.* v. *Star Publishing Co.*, 97 F. 2d 465, 470 (C. C. A. 9) : *N. L. R. B.* v. *Gluek Brewing Company*, 144 F. 2d 847 (C. C. A. 8) ; *N. L. R. B.* v. *Hudson Motor Car Company*, 128 F. 2d 528, 532–533 (C. C. A. 6) ; *N. L. R. B.* v. *John Engelhorn & Sons*, 134 F. 2d 553, 557 (C. C. A. 3) ; *McQuay-Norris Mfg. Co.* v. *N. L. R. B.*, 116 F. 2d 748, 752 (C. C. A. 7) ; *N. L. R. B.* v. *National Broadcasting Co., Inc.*, 150 F. 2d 895, 900 (C. C. A. 2).

The certification of the C. I. O. issued on the basis of the choice of the employees as expressed in a secret ballot election constituted a definitive and authoritative determination that a majority of the employees within an appropriate unit had designated the C. I. O. as their exclusive collective bargaining representative. As long as that certification had force and vitality, the employer, whether it be, as initially, the corporation or, as later, the corporation and the partnership, was in duty bound to honor the certification and to bargain with the certified organization on behalf of the employees covered by it. Respondents seek to interpose as an obstacle to the enforcement of that duty the short-term lease executed between the corporation and the partnership whereby the latter assumed the operation of the plant manufacturing facilities together with the employment of most of the employees covered by the certification. That arrangement, which respondents characterize as an exercise of an "absolute legal right," is relied upon to devitalize the certification. The corporation claims that it is required to bargain only with respect to the relatively few employees continued upon its pay roll, and the partnership, as an ostensibly separate legal entity, asserts that the certification is not binding upon it. They deem as irrelevant (1) the force of the certification as a continuing determination of the organizational preferences of a given group of employees realistically unaffected by a change in the identity of the employer, (2) the interlocking relationship between the corporation and the partnership manifest from an analysis of their com-

mon family and financial control, and, independent of that, the measure of control exercised by the corporation over the partnership apparent on the face of the agreement between them, and (3) the financial contributions that the corporation makes to the partnership to meet its pay-roll expense. In short, respondents seek to avoid the substance of a valid obligation through the erection of a legal facade.

However, a change in the ownership of the business of an offending employer, whether ostensible or real, will not be permitted to enfeeble the redress of unfair labor practices. In conformity with the general rule that a judgment may, "in appropriate circumstances, be enforced against those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons" (*Walling* v. *Reuter,* 321 U. S. 671, 674), compliance with a decree enforcing a Board order is exacted not only against "a disguised continuance of the old employer," which the partnership may very well be (*Southport Petroleum Co.* v. *N. L. R. B.,* 315 U. S. 100, 106), but also against a transferee who "on an appraisal of his relations and behavior" may be deemed to be "in active concert or participation" with the transferor in "carrying out prohibited acts," which the partnership certainly is (*Regal Knitwear Company* v. *N. L. R. B.,* 324 U. S. 9, 14–15). What is true as to the power to compel obedience to a decree in order to assure the redress of unfair labor practices, despite the fact that the transferee was not a party to the original administrative proceeding, is even more compellingly true as to a transferee whose relation to the

transferor has been developed at an administrative hearing upon notice.

The scope of the Board's power to reach each of the legal entities responsible for the infraction of statutory duties in order to effect a full redress of unfair labor practices is illustrated by the contrariety of situations in which the exercise of that power has been upheld as appropriate in the face of a challenge to its propriety. The controlling parent as well as the operating subsidiary of companies affiliated through common ownership;[44] the family or closely held business recast in the corporation or partnership form as well as the form through which it conducted its business prior to its transmutation;[45] the estate of the deceased partner as well as the surviving partners of a partnership dissolved through death;[46] the discharged reorganized company as well as the antecedent insolvent debtor in possession;[47] the lessees,

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[44] *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 262; *Consolidated Edison Company* v. *N. L. R. B.*, 305 U. S. 197, 217; *N. L. R. B.* v. *Federal Engineering Co., Inc.*, 153 F. 2d 233 (C. C. A. 6); *N. L. R. B.* v. *Swift & Co.*, 127 F. 2d 30, 32 (C. C. A. 6); *N. L. R. B.* v. *Whittier Mills*, 111 F. 2d 474, 476 (C. C. A. 5); *Bethlehem Steel Company* v. *N. L. R. B.*, 120 F. 2d 641, 648–652 (C. A. D. C.); *N. L. R. B.* v. *Hearst*, 102 F. 2d 658, 659, 663 (C. C. A. 9); *N. L. R. B.* v. *Lund*, 103 F. 2d 815, 818–819 (C. C. A. 8); *N. L. R. B.* v. *Condenser Corporation of America*, 128 F. 2d 67, 71 (C. C. A. 3).

[45] *N. L. R. B.* v. *Adel Clay Products Company*, 134 F. 2d 342, 346 (C. C. A. 8); *De Bardeleben* v. *N. L. R. B.*, 135 F. 2d 13, 14 (C. C. A. 5).

[46] *N. L. R. B.* v. *Colten*, 105 F. 2d 179, 183 (C. C. A. 6); *N. L. R. B.* v. *Wm. Tehel Bottling Company*, 129 F. 2d 250 (C. C. A. 8).

[47] *N. L. R. B.* v. *Baldwin Locomotive Works*, 128 F. 2d 39, 43–44 (C. C. A. 3); *N. L. R. B.* v. *W. C. Bachelder*, 125 F. 2d 387, 388 (C. C. A. 7).

vendees, and successors of a going concern as well as their lessors, vendors, and predecessors;[48] and independent contractors who have undertaken to perform a service for or operate a part of a business as well as the legal entity with whom they have contracted[49] have all been held amenable to the remedial powers of the Act where they have participated in, continued with, or profited from a course of unfair labor practices. The rationale underlying these decisions is expressed in the frequently cited decision of the Court of Appeals for the Sixth Circuit in *N. L. R. B.* v. *Colten*, 105 F. 2d 179, 183 (C. C. A. 6):

> It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace * * *. It needs no demonstration that the strife which is sought to be averted is no less an object of legislative solicitude when contract, death, or operation of law brings about change of ownership in the employing agency.

Consequently, the relevant inquiry in this case is not whether the arrangement between the corporation

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[48] *N. L. R. B.* v. *National Garment Co.*, 166 F. 2d 233, 238 (C. C. A. 8); *N. L. R. B.* v. *Blair Quarries, Inc.*, 152 F. 2d 25 (C. C. A. 4); *N. L. R. B.* v. *Weirton Steel Company*, 135 F. 2d 494, 498–499 (C. C. A. 3); *Union Drawn Steel Co.* v. *N. L. R. B.*, 109 F. 2d 587, 589, 595 (C. C. A. 3); *N. L. R. B.* v. *Hopwood Retinning Co, Inc.*, 104 F. 2d 302 (C. C. A. 2); *Le Tourneau Company of Georgia* v. *N. L. R. B.*, 150 F. 2d 1012 (C. C. A. 5.) Cf. *Matter of Alexander Milburn Co.*, 78 N. L. R. B. No. 87, 22 L. R. R. M. 1249.

[49] *N. L. R. B.* v. *Long Lake Lumber Company*, 138 F. 2d 363, 364 (C. C. A. 9); *Butler Bros.* v. *N. L. R. B.*, 134 F. 2d 981, 984–985 (C. C. A. 7); *N. L. R. B.* v. *Gluek Brewing Company*, 144 F 2d 847, 850, 853, 855, 857 (C. C. A. 8); *N. L. R. B.* v. *Grower-Shipper Vegetable Association*, 122 F. 2d 368, 378 (C. C. A. 9).

and the partnership is an exercise of an "absolute legal right," but whether, in order to dissipate the effects of unfair labor practices, the relationship between the corporation and the partnership and their relation to the employees affected by the unfair conduct is such as to justify an order directed against both. Judged in terms of that relevant standard, there is no question as to the propriety of the Board's order requiring respondents to bargain with the C. I. O.

An analysis of the interlocking family and financial controls of the corporation and the partnership (*supra,* pp. 21–25) demonstrates beyond cavil that the holdings in the partnership, the control of it, and the earnings to be derived from it are in precise ratio with the corporate holdings, control and earnings. An analysis of the lease executed between them, for a term of less than one year, demonstrates that their arrangement contemplated in the main a division of function to the end that the partnership constituted the manufacturing arm and the corporation the purchases, sales and distribution arm of a single integrated enterprise (*supra,* pp. 25–26).[50] Utilities expense, repairs, taxes and insurance on plant and equipment are all borne by the corporation. The manufacture of products conforms to specifications and standards of care prescribed by the corporation. Materials and equipment necessary for their manufacture are furnished by the corporation. The partnership

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[50] *N. L. R. B.* v. *Condenser Corporation of America*, 128 F. 2d 67, 71 (C. C. A. 3); *N. L. R. B.* v. *Hopwood Retinning Co., Inc.*, 104 F. 2d 302, 304 (C. C. A. 2).

cannot manufacture or sell products on its own account without the written consent of the corporation. In short, as the managing partner of the partnership testified: "* * * we have no sales or intention of sales; we as Pioneer. We are strictly manufacturers" (R. IV, 1427).

As the *manufacturing* arm of the enterprise the partnership assumed the employment of most of the *production and maintenance* employees. All antecedent benefits which the employees enjoyed, including seniority, pensions, insurance, bonuses, and contributions to the Five and Over Club, were continued by the partnership. The cost involved in maintaining these benefits is borne directly by the corporation. In fact, all of the partnership's pay-roll expense is borne by the corporation, since the partnership's compensation for its services is measured by "*cost of labor* plus two and one-half percent" (*supra,* p. 26). The personnel manager testified that he observed no "substantial difference" in manufacturing procedure as a result of the transfer (R. III, 1333); the foreman of the foundry in which seventy-five to eighty men work testified that there was no change in the foundry's operations as a result of the transfer (R. III, 1366–1368, R. IV, 1369–1372); the president of the corporation testified that approximately the same number of production and maintenance workers were employed at the factory at the time of the hearing as of the date of the transfer (Cf. R. III, 1176, with R. IV, 1515); the managing partner of the partnership testified that changes in manufacturing procedures were in the planning stage only (R. IV, 1452).

In a word, no essential attribute of the employment relationship was changed *with the single exception that respondents refused even to pretend to bargain with the C. I. O. as the collective bargaining representative of the employees now nominally on the partnership's pay roll.*

The certification of the C. I. O. was, however, a definitive determination of the organizational preferences of the production and maintenance employees at the plant, and, in accordance with their duties under Section 8 (5) of the Act, it was incumbent upon respondents to bargain with the C. I. O. The continuing effectiveness of the certification as a criterion of the employees' choice was hardly abated by the change in the form in which respondents conducted their business. Any contention that the C. I. O. was no longer the designee of these employees can only be premised upon the proposition that when the legal ownership changed, the organizational preferences of the employees changed, a clear non sequitur.

This precise issue was before the Court of Appeals for Fourth Circuit in *N. L. R. B.* v. *Blair Quarries, Inc.,* 152 F. 2d 25 (C. C. A. 4). In that case, the lessee of a quarry, a stranger to the lessor, assumed the operation of the quarry. Three months prior to the lessee's assumption of operations, a union had been certified as the collective-bargaining representative of the employees at the quarry. The lessee refused to bargain with the union, and defended its refusal on the ground that the union did not represent a majority of the employees. It was held that the lessee was required to bargain with the certified union since "It is

the established rule that a certification must be deemed effective for a reasonable period after its issuance and it cannot be claimed that such a period had expired when the refusal * * * to bargain took place" (152 F. 2d at 26–27). Similarly, in this case barely two months had elapsed between the election and the transfer of manufacturing facilities. The certification therefore continued with undiminished vigor to represent the will of the employees.

This conclusion is not affected by the merger, alluded to in the dissent (R. I, 186), of the fifteen production and maintenance employees who were on the partnership pay roll prior to the transfer of manufacturing facilities into the appropriate unit initially composed solely of corporation's production and maintenance employees.[51] The C. I. O. won the election by a margin of 63 votes. Had all fifteen partnership employees participated in the election and voted against the C. I. O., the election results would not have been affected, and the C. I. O. would still

[51] Neither the A. F. of L. nor the C. I. O. sought to include the partnership's employees within the scope of the consent election agreement at the time it was negotiated. The C. I. O.'s decision was based on its belief that at the time of its organizational drive the parnership was no longer "an operating concern, * * * that it was a wartime operation and had gone out of existence along about V-J day or prior thereto" (R. III, 917, 915–917, 929–931). This belief was reasonable in view of the genesis of the partnership and the rapid drop in its employment from one hundred eighty employees on V-J day to fifteen employees at the time of the election (*supra*, p. 5). The A. F. L. did not offer an explanation. The omission of these employees from the election has no discernible relevance to the propriety of the Board's remedy shaped in the light of events as they actually transpired.

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have been the designated representative. Moreover, assuming that there had been no transfer of manufacturing facilities, and the corporation had continued as the sole employer, it could scarcely be contended that the certification of the C. I. O. would have been devitalized had the corporation hired fifteen additional employees. The situation here is essentially no different.

Consequently, the certification constituted the effective determination of the wishes of a majority of the employees. No evidence was introduced at the hearing to show that any defection from the ranks of the C. I. O. had occurred. In accordance with "the familiar rule that a state of affairs once shown to exist is presumed to continue to exist until the contrary is shown,"[52] initially applied by this Court to a labor relations situation,[53] the presumption of the continuity of the status of the C. I. O. as the established bargaining representative had not been overcome. In any event, even if the C. I. O. lost its majority status, the Board found (R. I, 97, 105–106) that such defection would be attributable to the unfair labor practices, and as this Court has held, could not "operate

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[52] *N. L. R. B.* v. *National Motor Bearing Co.*, 105 F. 2d 652, 660 (C. C. A. 9), noted in 9 Wigmore, Evidence § 2530 n. 4 (Supp. 3 ed. 1943). This rule has been uniformly followed. *N. L. R. B.* v. *Harris-Woodson Co., Inc.*, 162 F. 2d 97 (C. C. A. 4); *Oughton* v. *N. L. R. B.*, 118 F. 2d 486, 498–499 (C. C. A. 3) cert. denied, 315 U. S. 797; *N. L. R. B.* v. *Whittier Mills Company*, 111 F. 2d 474, 478 (C. C. A. 5); *N. L. R. B.* v. *Highland Park Manufacturing Company*, 110 F. 2d 632, 640 (C. C. A. 4); *N. L. R. B.* v. *Piqua Munising Wood Products Co.*, 109 F. 2d 552, 554 (C. C. A. 6); *Colorado Fuel and Iron Corporation* v. *N. L. R. B.*, 121 F. 2d 165, 175 (C. C. A. 10).

[53] *N. L. R. B.* v. *Biles-Coleman Lumber Co.*, 96 F. 2d 197 (C. C. A. 9).

to change the bargaining representative previously selected * * * regardless of any shift in membership." *N. L. R. B.* v. *Cowell Portland Cement Co.*, 148 F. 2d 237, 242 (C. C. A. 9). Until the effects of the unfair labor practices are expunged by genuine bargaining, the C. I. O. must be recognized as the exclusive bargaining representative. *Frank Bros. Company* v. *N. L. R. B.*, 321 U. S. 702; *N. L. R. B.* v. *P. Lorillard Company*, 314 U. S. 512; *I. A. M.* v. *N. L. R. B.*, 311 U. S. 72, 83; *N. L. R. B.* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 339–340; *N. L. R. B.* v. *Swift & Co.*, 162 F. 2d 575, 582–585 (C. C. A. 3), cert. denied, 332 U. S. 791.[54]

[54] In their answer to the Board's petition for enforcement, respondents contend "that the question presented by the Petition has become moot in that all employees of both concerns are and have been members in good standing of the various Crafts of the American Federation of Labor for over two years prior to the filing of the Petition herein" (R. I, 215). Inasmuch as respondents' closed shop agreement with the A. F. L. requires membership therein as a condition of employment with respondents, it would hardly be surprising were all employees presently members of the A. F. of L. Respondents do not undertake to explain, nor can we imagine, in what respect this fact would moot the case. On the contrary, as the cases cited in the text conclusively settle, respondents' complete success in securing defection from the C. I. O. through their course of unfair conduct requires an effective Board order in order to restore the condition of free employee choice.

In their answer too, in evident reference to Section 9 (b) (2) of the Act, as amended, which provides that "the Board shall not * * * decide that any craft unit is inappropriate for * * * [collective bargaining] purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation," respondents further contend that "the remedy requested in said Petition is inconsistent with the Labor-Management Relations Act of 1947 wherein it provides that, other things being equal, the Board should allow the craft preferences

Accordingly, the Board concluded that the corporation and the partnership "are joint employers of the employees here involved within the meaning of Section 2 (2) of the Act," and that "by refusing * * * to bargain with the * * * [C. I. O.] as the certified exclusive representative of its employees in the unit heretofore found to be appropriate, the respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (5) of the Act" (R. I, 111–112). In ordering respondents to bargain with the C. I. O., the Board followed the practice sanctioned by this Court. This Court's suggestion in *N. L. R. B.* v. *Hearst,* 102 F. 2d 658, 663 (C. C. A. 9), that "several corporations might, together, employ one man" was confirmed in *N. L. R. B.* v. *Long Lake Lumber Company,* 138 F. 2d 363, 364 (C. C. A. 9), where this Court enforced the Board's order requiring an individual and a company "as joint employers" to bargain collectively with the representative of a unit of employees. Similarly in this

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of the employees; that the employees' preference * * * is 100% various American Federation of Labor crafts" (R. I, 216). Not only do respondents oversimplify and misconstrue the legal purport of this provision (*see Matter of National Tube Co.*, 76 N. L. R. B. 1199, 21 L. R. R. M. 1292), but the factual situation in this case affords no occasion for its application. In a freely and fairly conducted consent election, based upon a unit fully agreed to be appropriate by all parties in the consent election agreement, the employees chose to be represented by the C. I. O. over the A. F. L. by a vote of 177 to 114 (*supra*, pp. 66–68). Not content to abide by the employees' expressed desires, respondents engaged in a course of unfair conduct designed to displace the C. I. O. and to establish the A. F. L. as bargaining representative. It is therefore not the Board, but respondents who are seeking to foist an unwanted bargaining agent upon the employees.

case, the relationship between the corporation and the partnership, their joint relationship to the employees, and their common responsibility for the unfair labor practices, the effects of which must be expunged, justifies their amenability as joint employers to the remedial powers of the Act.

This conclusion is unaffected by the finding, upon which Board Member Reilly relied in dissenting from the portion of the order requiring respondents to bargain with the C. I. O., that "certain OPA and tax advantages had some influence on the decision to transfer the manufacturing operations * * *"[55] (R. I, 179–180; R. III, 1027–1028, R. IV, 1428–1429). The Board's remedy achieves the precisely accurate result of permitting respondents to retain any lawfully derived advantages arising from their arrangement, but divests them of those advantages which spring from their infractions

[55] In resisting suits against dissolved corporations upon causes of action arising prior to voluntary dissolution, it is apparently standard pleading practice to allege that the dissolution was caused by the desire to lessen tax burdens. Marcus, *Suability of Dissolved Corporations* (1945), 58 Harv. L. Rev. 675. In *Walling* v. *Reuter*, 321 U. S. 671, where the Supreme Court considered the cause upon motion papers, an allegation that "the purpose of the dissolution is * * * to secure tax advantages" (*id.*, at 673) did not deter the Supreme Court from holding that an injunction obtained to restrain violations of the Fair Labor Standards Act is enforceable by contempt proceedings not only "against the corporation, its agents and officers and those individuals associated with it in the conduct of its business [citations], but it may also, in appropriate circumstances, be enforced against those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons. The vitality of the judgment in such a case survives the dissolution of the corporate defendant" (*id.*, at 674).

of the Act. In sum, the conclusion of the Court of Appeals for the Third Circuit in *N. L. R. B.* v. *Condenser Corporation of America,* 128 F. 2d 67, 71–72 (C. C. A. 3), upon a closely analogous state of facts, is particularly apposite here:

> Under these circumstances we believe the relationship of these two corporations is such that an order pursuant to the provisions of the statute is proper against both. * * * This is in no sense a penalty against the parties for an arrangement which is deemed by them to be in the interests of efficiency. It simply rests on the premise that where in fact the production and distribution of merchandise is one enterprise, that enterprise, as a whole, is responsible for compliance with the Labor Relations Act regardless of the corporate arrangements of the parties among themselves. What is important for our purpose is the degree of control over the labor relations in issue exercised by the company charged as a respondent. *Press Co. Inc.,* v. *N. L. R. B.,* 1940, 73 App. D. C. 103, 118 F. 2d 937. Regardless of what Cornell says concerning its connection with Condenser's employees it appears that "together, respondents act as employers of those employees * * * and together actively deal with labor relations of those employees." *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.,* 1938, 303 U. S. 261, 263 * * * "* * * the problem is not to be approached from the standpoint of vicarious liability." *Consolidated Edison Co. of New York, Inc.,* v. *N. L. R. B.,* 2 Cir., 1938, 95 F. 2d 390, 394, modified on another point, and affirmed, 1938,

> 305 U. S. 197. * * * It is rather a matter of determining which of two, or whether both, respondents control, in the capacity of employer, the labor relations of a given group of workers. *N. L. R. B.* v. *Lund,* 8 Cir., 1939, 103 F. 2d 815, 819.

B. The remaining provisions of the order

The remaining provisions of the Board's order are the usual, judicially approved remedies for the unfair labor practices found and are clearly proper. The requirements that respondents cease recognizing the A. F. L. and giving effect to the contract with it are the acknowledged remedies for illegal assistance to a union culminating in a contract with it. *I. A. M.* v. *N. L. R. B.,* 311 U. S. 72, 75; *N. L. R. B.* v. *Electric Vacuum Cleaner Co., Inc.,* 315 U. S. 685, 695; *N. L. R. B.* v. *National Motor Bearing Co.,* 105 F. 2d 652, 656–662 (C. C. A. 9); *N. L. R. B.* v. *Cowell Portland Cement Company,* 148 F. 2d 237, 244–246 (C. C. A. 9).[56]

[56] Although it has not sought intervention in this proceeding to resist enforcement of the Board's order, the Painters, A. F. L., contended specially before the Board that the contract should not be set aside with respect to it, because it did not participate in the arrangements for the consent election. The contention, properly rejected by the Board (R. I, 104), falls on three grounds. First, whether or not the Painters participated in the arrangements for the election does not alter the fact that it benefited from the illegal assistance rendered by respondents. Second, there is no doubt that the Painters as an A. F. L. organization would have followed the precise course agreed upon by the other A. F. L. unions, including its designation on the ballot in the name of the Los Angeles Metal Trades Council, A. F. L. The eligibility list indicates that four painters participated in the election (R. I, 104; R. IV, 1695, 1698, 1699, 1700). It is therefore unable to show any prejudice.

IV. The Board acquired jurisdiction over each partner by valid service of process and general appearance

It is contended that service of process by the Board upon some of the partners was defective. The scope of the objection to the service, beyond its bare assertion, was not stated with particularity. It is clear that the Board's jurisdiction over each of the partners was properly invoked both by service in conformity with the provisions of the Act and by general appearance entered on behalf of each of the partners.

Section 11 (4) of the Act provides that:

> Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail. * * * The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return postoffice receipt * * * therefor when registered and mailed * * * as aforesaid shall be proof of service of the same.

Third, during the course of an investigation of representatives, the Board's agents make diligent efforts to ascertain the identity of all unions claiming an interest among the affected employees. It is the uniform practice to post election notices throughout the plant before the election, and in this case election notices were posted four days before the election (*supra*, p. 66). Interested employees are thereby afforded an opportunity of notifying the union of their choice of the prospective election. These usual precautions afford practical certainty that all interested unions have an opportunity of participating in the election, and a belated claim to representation subsequent to the election, in the absence of unusual circumstances, cannot be permitted to disturb the necessary finality of the election results. See, *supra*, p. 70, n. 42: *Matter of the United Boat Service Corporation*, 55 N. L. R. B. 671.

In conformity therewith, the following documents were served upon each of the partners by post-paid, registered mail: (1) Complaint, charge, and notice of hearing, (2) amended complaint, (3) order postponing hearing, amended charge, and second amended complaint (Bd's Exhs. 1–D, 1–G, 1–O).[57] Service in the foregoing manner was attested to under oath by the Board's agent making the same (*Ibid.*). Return receipts, subscribed to either by the partner or his agent, indicate that each partner received the registered documents (Bd's. Exhs. E–1, E–2, H–1, H–2, P–1, P–2).[58] At the outset of the hearing, the attorney for the respondents entered a general appearance on behalf of the corporation, the partnership, and each partner individually (R. I, 224). During the first day of the hearing, the attorney for respondents filed with the attorney for the Board a joint answer on behalf of the corporation, the partnership, and the partners individually pleading to the merits of the allegations of the Board's complaint, amended complaint, and second amended complaint (R. I, 275, 37–42). No defect of service was alleged. During the course of the hearing, at which the partnership's defense on the merits was fully litigated,

[57] Although included in the Board's designation of record, these exhibits were not printed in the record. They are available for examination in the transcript of record certified by the Board to the Court.

The documents mentioned in the exhibits were mailed to the partners at their addresses as indicated on the certificate of business fictitious firm name filed with the county clerk by the partnership pursuant to California Law (R. IV, 1703–1716). Calif. Civil Code, § 2466–§ 2471 (Deering, 1941).

[58] See note 57 above.

two of the partners, William John O'Keefe and Wilbur G. Durant, the managing partner, testified on behalf of the partnership (R. IV, 1487, 1414).

Following the entry of a general appearance on behalf of each partner, the attorney for respondents, primarily in support of a motion to postpone the hearing, vaguely intimated lack of adequate notice to some of the partners without definitely identifying those partners as to whom the alleged defect pertained (R. I, 232, 272). In support of the motion for a continuance, an affidavit of one of the partners was submitted authorizing the attorney to represent the partnership and five of the seven partners at the hearing, but purporting to be unable to authorize the representation of the remaining two partners, Marion Jenks and Wilbur G. Durant, who were asserted to be absent from Los Angeles (R. IV, 1663–1664). As to Durant, however, service was admitted at the hearing (R. I, 247–248). Consequently, only partner Marion Jenks is alleged to have been without notice.

Respondent's motion for a continuance was granted, as was that of the A. F. L. which requested a continuance for independent reasons, and the hearing was postponed one week (R. I, 282). After the resumption of the hearing one week later, the attorney for respondents stated that he was "now appearing on behalf of those respondents who have been properly served" (R. I, 290). Upon being asked to identify those individuals, he stated, "I don't see where it is incumbent upon me to state those I do

represent and those I do not, other than to say I will represent all those that have been properly served" (R. I, 291). No evidence was introduced during the hearing to support the ultimate contention that service on one or more of the partners was defective.

Service of process upon each partner and proof of service thereof was made in conformity with the provisions of the Act. Cf. *N. L. R. B.* v. *Hearst,* 102 F. 2d 658, 662 (C. C. A. 9). No evidence of miscarriage of service was introduced. Consequently, its presumptive adequacy stands unrefuted. It is accordingly plain that the Board acquired jurisdiction over the person of each partner. Moreover, it is elementary that defects in service, if any there were, were cured by submission to the jurisdiction of the Board through the general appearance entered on behalf of each partner at the outset of the hearing and evidenced as well in the answer to the Board's complaint. An attempt to withdraw the general appearance subsequent to its entry in order to question the service is precluded in the interests of orderly procedure and prevention of prejudice to adverse parties. *Creighton* v. *Kerr,* 1 Colorado 509, affirmed 87 U. S. 8; *Eldred* v. *Bank,* 84 U. S. 545; *Rio Grande Irrigation and Colonization Co.* v. *Gildersleeve,* 174 U. S. 603, 606. Consequently, the Board's order directed against each partner in his individual capacity is clearly proper. In any event, since the well-nigh universal demise of the common law doctrine that service upon each partner present within the jurisdiction is necessary

to subject the partnership to jurisdiction,[59] the order directed against the partnership in its name, based upon the admitted service upon the managing partner, the affidavit of representation as to five partners, and the appearance at the hearing of two of the partners, is undeniably appropriate, particularly in view of Rule 17 (b) of the Federal Rules of Civil Procedure which provides "that a partnership or other unincorporated association * * * may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States."

V. The provisions of the Board's order requiring respondents to bargain with the C. I. O. are properly conditioned upon compliance with Section 9 (f), (g), and (h), but the remaining provisions of the order are properly enforceable unconditionally

In its petition for enforcement of the Board's order, the Board recommended that the enforcement of those portions of the order requiring respondents to bargain

[59] See, e. g. Fed Rules Civ. Proc., 4 (d) (3) and (7), 17 (b); *Sugg* v. *Thornton*, 132 U. S. 524; *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344, 383–392; *Bowles* v. *Marx Hide & Tallow Co.*, 4 F. R. D. 297, *Jardine* v. *Superior Court*, 213 Cal. 301, 2 Pac. (2d) 756; *Cotten* v. *Perishable Air Conditioners*, 18 Cal. 2d 635, 116 Pac. (2d) 603; Note, 136 A. L. R. 1071 (1942); Note, 79 A. L. R. 305 (1932); 1 *Moore's Federal Practice* 313–314 (1938); 2 Id. 2097–2102 (1938). Some courts, even without the aid of a statute, deemed it "clear on both reason and authority that service upon one or more members of a partnership in a suit instituted against the firm is a good service for the purpose of affecting the partnership with notice and in the event of recovery of binding the partnership property." Magruder and Foster, *Jurisdiction Over Partnerships* (1924), 37 Harv. L. Rev. 793, 799–800; Note, 136 A. L. R. 1071–1072 (1942).

with the C. I. O., paragraphs 1 (d) and 2 (b), be conditioned upon compliance by Local 1981, Stove Division, United Steelworkers of America, C. I. O., and its parent body, United Steelworkers of America, with the provisions of Section 9 (f), (g), and (h) of the Act, as amended, within thirty days of the decree enforcing the order (R. I, 203–204). It is the Board's position that compliance with Section 9 (f), (g), and (h) by the labor organizations involved may appropriately be exacted as a condition precedent to the enforcement of that part of the order which requires respondents to bargain with the C. I. O., but that compliance is irrelevant to the enforcement of the remaining provisions of the order.

In their motion to intervene, the local union and Philip Murray, individually and as president of the parent body, state that the parent body "has already complied with Section 9 (f) and (g) of the Act, as amended" and that the local union "will comply with said sections within thirty (30) days from any decree of this Court" (R. IV, 1774). They state, however, that "neither the officers" of the parent body "nor the officers" of the local union "have complied with Section 9 (h) of the Act, as amended, nor will said officers comply," and urge as their reason "that the provisions of Section 9 (h) of the Act, as amended, are illegal, unconstitutional and void on the ground that said section violates Article I, Section 9 (3) of the Constitution of the United States and the First, Fifth, Ninth, and Tenth Amendments to the Constitution of the United States" (R. IV, 1774). It is clear therefore that, apart from their challenge

to the constitutionality of Section 9 (h), they do not question the propriety of the interpretation of Section 9 (f), (g), and (h) as requiring compliance therewith as a condition precedent to the enforcement of the order to bargain. Respondents, on the other hand, in their answer to the Board's petition, appear to contend that compliance with Section 9 (h) is a necessary condition precedent to the enforcement of the order in its entirety, and not simply to the enforcement of that portion of the order which requires them to bargain with the C. I. O. This portion of the brief will be devoted solely to showing the propriety of the Board's interpretation of Section 9 (f), (g), and (h). The constitutionality of Section 9 (h) will be briefed in reply to the brief of the intervenors, Local 1981 and Philip Murray, who stand as moving parties on this phase of the case.[60]

Section 9 (f), (g), and (h) of the Act, as amended, became effective August 22, 1947 (Sec. 104, the Act, as amended). The second amended complaint in this case was issued on February 20, 1946 (R. I, 34). The hearing was held on various days from March 6, 1946, through March 28, 1946 (R. I, 67), the intermediate report was issued on June 4, 1946 (R. I, 117), and the Board's decision and order, finding and remedying violations of Section 8 (1) and (5) of the Act, were issued on August 26, 1946 (R. I, 185). In short, every step in the proceedings before the Board through final order was completed almost one year prior to the effective date of the amendments to the Act.

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[60] The constitutionality of Section 9 (f) and (g) has been sustained in *N. M. U.* v. *Herzog*, 334 U. S. 854.

In cases which rest upon outstanding complaints that antedate the effective date of the amendments to the Act, it is the Board's position and settled practice to distinguish between those aspects of the case which relate to violations of Section 8 (1), (2), (3), and (4) of the Act and those aspects of the case which relate to violations of Section 8 (5) of the Act, insofar as the applicability of Section 9 (f), (g), and (h) is concerned. Where the Board's order is designed to remedy an infraction of Section 8 (1), (2), (3), or (4) of the Act, compliance with Section 9 (f), (g), and (h) by the labor organization upon whose charge the case was initiated is irrelevant.[61] Where the Board's order is designed to remedy an infraction of Section 8 (5) of the Act, by an order to bargain, the Board conditions the order to bargain upon the future compliance of the labor organization with Section 9 (f), (g), and (h).[62] And where, as here, the unfair conduct entails a refusal to bargain in addition to other violations, only that portion of the Board's order which remedies the refusal to bargain is conditioned upon the future compliance by the labor organization with Section 9 (f), (g), and (h).[63] The propriety of the Board's position and practice entails consideration of the precise scope of the section.

Section 9 (f) provides for the filing of organizational and financial reports by a labor organization with the Secretary of Labor and for the furnishing

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[61] E. g., *Matter of E. L. Bruce Co.*, 75 N. L. R. B. 522.

[62] E. g., *Matter of Marshall and Bruce Company*, 75 N. L. R. B. 90.

[63] E. g., *Matter of Sifers Candy Co.*, 75 N. L. R. B. 296.

of financial reports by a labor organization to its members. Section 9 (g) provides that this information shall be brought up to date and filed with the Secretary of Labor and furnished to the members annually. Section 9 (h) provides for the filing with the Board by "each officer" of a labor organization of an affidavit attesting "that he is not a member of or supports any organization that believes in or the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in, or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods." Each subsection provides that the same data shall be filed by "any national or international labor organization of which" the filing labor organization "is an affiliate or constituent unit." The failure of a labor organization or its officers to comply with Section 9 (f), (g), and (h) precludes the Board from (1) investigating a question concerning representation raised by the labor organization, (2) entertaining a petition for a union shop election on behalf of the labor organization, or (3) issuing a complaint pursuant to a charge filed by the labor organization.

In *Matter of Marshall and Bruce Co.,* 75 N. L. R. B. 90, the Board, in considering the applicability of Section 9 (f), (g), and (h) to complaints issued prior to the effective date of the amendments to the Act, concluded that it did not affect the Board's power to proceed upon complaints already issued notwithstanding noncompliance, and stated its rationale as follows (75 N. L. R. B. at 95):

> * * * This particular complaint issued in 1946, long before the passage of the Labor Management Relations Act. Section 9 (f) and (h) provide that "no complaint *shall* be issued" and Section 9 (g) provides that "no complaint shall issue" in the event of noncompliance. The use of the term "shall" in such a context has been held to indicate legislative intent that an Act apply only to actions taken *after* the effective date of the Act and not to affect actions taken prior thereto. * * * We *unanimously* conclude that, in view of the prospective language of the amendment and the recognized rule of construction with respect to statutory changes in matters of procedure the current failure of the Union to comply with Section 9 (f), (g), and (h) does not impair the Board's *power* to issue the usual remedial order requiring that the respondent unconditionally bargain upon request with the Union. Nor would it limit our power to issue our usual remedial orders for violations of Section 8 (1), (2), (3), or (4) of the old statute if such were here involved.

The Board's conclusion quoted above is supported by recent decisions of the several courts of appeals squarely in point. In *N. L. R. B.* v. *Whittenburg,* 165 F. 2d 102, 104–105 (C. C. A. 5), the Court of Appeals for the Fifth Circuit, enforcing unconditionally a Board order remedying violations of Section 8 (1) and (3) of the Act (66 N. L. R. B. 1442, 1443–1444), stated:

> The changes or amendments made by sections 9 (f), (g), and (h) of * * * [the Act] are

> procedural changes which, according to the well-established rule, are applicable to pending cases only to the extent that the procedural steps dealt with have not yet been taken. *Dunlap* v. *United States,* 43 F. 2d 999; Rule 86, Federal Rules of Civil Procedure; *Bowles* v. *Strickland,* 151 F. 2d 419. The case at bar is an unfair-labor-practice proceeding with respect to which sections 9 (f), (g), and (h) require compliance only as a condition precedent to the issuance of a complaint. The issuance of the complaint in this case is a procedural step which was taken on March 10, 1945, more than two years before the amendments in question were enacted, and it is therefore governed by the law in effect at the time it was taken.

Similarly, in *N. L. R. B.* v. *Mylan-Sparta Company, Inc.,* 166 F. 2d 485, 487, 488, the Court of Appeals for the Sixth Circuit, rejecting a contention that the charging union's failure to comply with Section 9 (f), (g), and (h) invalidated a Board order remedying violations of Section 8 (1) and (3) of the Act (70 N. L. R. B. 574, 580–583) stated:

> the furnishing of the information and the filing of the affidavit [required by the amendments] are conditions precedent *to the filing of a complaint* under the 1947 Act. The complaint in the present case was not filed under the 1947 Act but was filed under the provisions of the * * * [1935 Act]. The amendment of the 1935 Act by the 1947 Act did not release or extinguish any of the liabilities which had been incurred under the original act. Such liabilities are expressly reserved by 1 USCA, Sec. 29.

> See *United States* v. *Reisinger,* 128 U. S. 398; *Hertz* v. *Woodman,* 218 U. S. 205, 217–218. In any event, the complaint in this proceeding had been issued, the decision and order of the Board had been entered, and the petition to enforce the order been filed before the effective date of the 1947 Act, which by its express terms, insofar as it applies to this issue, merely provides "no complaint shall be issued." The Act is prospective, not retroactive, in its effect.

And the Court of Appeals for the Eighth Circuit, in *N. L. R. B.* v. *National Garment Co.,* 166 F. 2d 233, 235–238 (C. C. A. 8), quoting extensively from the Board's decision in the *Marshall and Bruce* case, *supra,* also expressed its approval of the Board's rationale.[64]

These decisions,[65] supporting the Board's position with respect to the impact of Section 9 (f), (g), and (h) of the amended Act upon the Board's power to issue unconditional remedial orders, where its complaint has issued prior to the effective date of the amendments, are in accord with the recognized rules of statutory construction applied by the courts, to language such as that which appears in Section 9 (f),

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[64] And see *N. L. R. B.* v. *Gate City Cotton Mills,* 167 F. 2d 647, 649 (C. C. A. 5); *N. L. R. B.* v. *Caroline Mills, Inc.,* 167 F. 2d 212, 214 (C. C. A. 5).

[65] In numerous other cases decided by the courts since the effective date of Section 9 (f), (g), and (h), orders remedying violations of Section 8 (1), (2), (3), and (4) have been unconditionally enforced without any reference to Section 9 (f), (g), and (h). Thus see *Donnelly Garment Co.* v. *N. L. R. B.,* 165 F. 2d 940 (C. C. A. 8); *N. L. R. B.* v. *Sandy Hill Iron & Brass Works,* 165 F. 2d 660 (C. C. A. 2); *N. L. R. B.* v. *Stowe Spinning Co.,* 165 F. 2d 609 (C C. A. 4).

(g), and (h). The repetitive use in this section of the phrase "no complaint shall issue" or "be issued" clearly discloses a legislative intent to look to future complaints and not to govern proceedings where the complaints had been issued prior to the effective date of the amendment. See *Richard* v. *National City Bank,* 6 F. Supp. 156 (D. C. N. Y.); *Ex parte Morel,* 292 Fed. 423, 428 (D. C. Wash).

These decisions are also in accord with the well-established rule that procedural changes in a statute are "applicable only to proceedings taken after the amendment and not to proceedings taken prior thereto." 1 Sutherland, *Statutory Construction,* Section 1936, p. 438, note 13 (3d Ed. 1943). So, "where a new statute deals with procedure only, *prima facie* it applies to all actions—to those which have accrued or are pending, and to future actions. But the steps already taken, the pleadings, and all things done under the old law will stand, unless an intent to the contrary is plainly manifest." 2 Sutherland, *op. cit. supra,* Section 2212, p. 136.

As Mr. Justice Cardozo stated in *Berkovitz* v. *Arbib & Houlberg, Inc.,* 230 N. Y. 261, 130 N. E. 288, 290, a statutory amendment affecting a procedural step is deemed inapplicable to pending cases where otherwise "the effect is to reach backward, and nullify by relation the things already done [citing cases]. There can be no presumption, for illustration, that a statute regulating the form of pleadings or decisions is intended to invalidate pleadings already served, or decisions already filed." Procedural changes affect

pending cases only to the extent that the procedural steps dealt with in the amendment have not yet been taken.[66] Future steps in pending cases, of course, are governed by the new law.[67]

This doctrine was embodied in Rule 86 of the Federal Rules of Civil Procedure, which provides that the new rules shall govern "all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies." Rule 86 has been construed by the federal courts as requiring that all procedural steps taken prior to the effective date of the new rules be tested under

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[66] See *Dunlap* v. *United States*, 43 F. 2d 999, appeal dismissed, 45 F. 2d 1021 (C. C. A. 9); In *re Jacobs*, 31 F. Supp. 620; *Hubbell* v. *United States*, 4 Ct. Claims 37; *Robinson* v. *State*, 177 Ind. 263, 97 N. E. 929; *Secor* v. *State*, 118 Wisc. 621, 95 N. W. 942; *Boyda Dairy Co.* v. *Continental Casualty Co.*, 299 Ill. App. 469, 20 N. E. (2d) 339; *Bedier* v. *Fuller*, 116 Mich. 126, 74 N. W. 506; *Richardson* v. *Fitzgerald*, 132 Iowa 253, 109 N. W. 866; *Marks* v. *Crow*, 14 Ore. 382; 13 Pac. 55; *Salt Lake Coffee & Spice Co.* v. *District Court*, 44 Utah 411, 140 Pac. 666, 668–669; *Hanover National Bank* v. *Johnson*, 90 Ala. 549, 8 So. 42; *East Pratt Coal Co.* v. *Jones*, 16 Ala. App. 130, 75 So. 722, certiorari denied 200 Ala. 697, 76 So. 995; *Wanstrath* v. *Kapel*, 190 S. W. 2d 241 (Sup. Ct. Mo.); In *re Martell's Estate*, 276 Mass. 174, 177 N. E. 102; *Walker* v. *Walker*, 155 N. Y. 77, 49 N. E. 663.

[67] See *U. S.* v. *Hooe*, 3 Cranch (U. S.) 73, 78; *Murphy* v. *Boston & M. R. R.*, 77 N. H. 573, 94 Atl. 967; *Hartley* v. *Johnson*, 54 R. I. 477, 175 Atl. 653; *American Locomotive Co.* v. *Hamblen*, 217 Mass. 513, 105 N. E. 371; *People* v. *Foster*, 261 Mich. 247, 246 N. W. 60, 62; *Clugston* v. *Rogers*, 203 Mich. 339, 169 N. W. 9.

the old rules in effect at the time such steps were taken.[68]

The distinction drawn by the Board between the irrelevance of compliance where orders remedy violations of Section 8 (1), (2), (3), and (4) of the Act and the necessity for compliance where orders remedy violations of Section 8 (5) of the Act rests upon the sharp distinction drawn by the Act between the scope of application of Section 9 (f), (g), and (h) to unfair labor practice proceedings and their application to representation proceedings. With respect to unfair labor practices, compliance with Section 9 (f), (g), and (h) is exacted only as a condition precedent to the initial step of issuing a complaint. Contrariwise, in representation proceedings, all steps through certification, including those subsequent to the filing of a petition for certification, are conditioned upon compliance.[69] However, because of the large measure of practical identity between a certification by the Board of a union as the exclusive bargaining representative in a representation proceeding and an order by the Board that an employer bargain collectively with a union as the exclusive bargaining representative in an unfair labor practice proceeding, the Board, in *Matter of Marshall and Bruce Co.*, 75 N. L. R. B.

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[68] *Hawkinson* v. *Carnell & Bradburn*, 26 F. Supp. 150, 152 (D. C. Pa., 1938) (propriety of joinder); *Dolcater* v. *Manufacturers & Traders Trust Co.*, 25 F. Supp. 637, 640 (D. C. N. Y.) (application for intervention); *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 169–170 (propriety of refusal by circuit court of appeals to entertain suit for costs after expiration of term, when following this refusal, while case on appeal, the new rules, abolishing the term of court limitation were adopted).

[69] *Matter of Rite-Form Corset Company, Inc.*, 75 N. L. R. B. 174.

90, decided as a matter of policy, though not of power, that it should bar to a noncomplying union the use of the Board's processes to the extent that the unfair labor practice involves a refusal to bargain to be remedied by an order to bargain. As stated by the Board, although an unfair labor practice proceeding based on a refusal to bargain "does not involve the actual certification of a bargaining representative, an order requiring an employer to bargain collectively with a labor organization is often tantamount in practice to a certification of the latter as bargaining representative. It looks toward a future relationship" (75 N. L. R. B. at 95–96). The Board concluded, upon consideration of the interrelation between a certification and an order to bargain, that it would not effectuate the policies of the Act to order an employer to bargain with a union which the Board was without power to certify. It stated its rationale as follows (75 N. L. R. B. at 96):

> We are convinced that Section 9 (f), (g), and (h) not only provide procedural limitations upon the Board's power to act with respect to cases arising after the effective date of the amendment, but also embody a public policy denying utilization of the Board's processes directly to aid the bargaining position of a labor organization which has failed to comply with the foregoing Sections. We cannot believe that Congress intended the full force of Government to be brought to bear upon an employer to require him to bargain in the future with a Union which we now lack the authority to certify. Therefore, inasmuch as this union has not complied with Section 9 (f), (g), and

> (h) and is not presently qualified for certification as bargaining representative, our remedial order in this proceeding shall in part be conditioned upon compliance by the Union with that section of the amended Act, within 30 days from the date of the order herein.

As with the Board's treatment of orders remedying violations of Section 8 (1), (2), (3), and (4) of the Act, judicial approval has likewise been extended to the Board's treatment of orders dealing with violations of Section 8 (5) of the Act. The Court of Appeals for the Second Circuit expressly approved the conditioning of that part of the order remedying a refusal to bargain and the unconditional enforcement of the remainder of the order remedying other violations. *N. L. R. B.* v. *Brozen,* 166 F. 2d 812, 813–814 (C. C. A. 2). The Court of Appeals for the Seventh Circuit, in sustaining the constitutionality of Section 9 (h), enforced an order to bargain conditioned upon future compliance with Section 9 (f), (g), and (h), although the complaint was issued prior to the effective date of the amendments. *Inland Steel Co.* v. *N. L. R. B.,* 22 L. R. R. M. 2506, 2507–2508, 2514, 2521 (C. C. A. 7, September 23, 1948). So, too, this Court in *Times Mirror Company* v. *N. L. R. B.,* No. 10123 (C. C. A. 9, May 17, 1948), over objection by the union involved, granted the Board's motion to dismiss without prejudice a petition to adjudge an employer in contempt of a decree enforcing a bargaining order which had been entered prior to the amendment of the Act, where the union which was the beneficiary of the order had failed to comply with Section 9 (f), (g), and (h).

The distinction between orders remedying unfair labor practices under Section 8 (5) and orders remedying other unfair labor practices rests upon the recognition that an order to bargain deals preeminently with the union's continuing representative status. Because in its effect it parallels a certification which requires compliance with Section 9 (f), (g), and (h) at every stage of the Board proceedings, it is appropriate to construe the compliance requirements for an order to bargain and for a certification in *pari materia*. But a remedy for violations of Section 8 (1), (2), (3), or (4) of the Act in an unfair labor practice proceeding contains no counterpart in a representation proceeding.[70] In those instances, the statutory pattern therefore does not contemplate compliance beyond the initial step of determining whether to issue a complaint. The express terms of Section 9 (f), (g), and (h), a fair interpretation of its intendment, considerations of practical administrative procedure which is made correspondingly more difficult to the extent that compliance by a union at more than one determinative stage is exacted, and the pervasive need for assuring to employees the right to uncoerced self-organization, all combine to support the Board's policy of requiring compliance by the labor organization only to determine initially whether a complaint should issue where the violations relate to Section 8 (1), (2), (3), or (4) of the Act.

Accordingly, it is proper that the provisions of the Board's order requiring respondents to bargain with

[70] Orders remedying violations of Section 8 (1), (2), (3), or (4) of the Act, unlike orders remedying violations of Section 8 (5), usually do not grant direct benefits to unions as such.

the C. I. O. be conditioned upon compliance with Section 9 (f), (g), and (h) within thirty days after entry of decree, but that the remaining provisions of the Board's order be unconditionally enforced.

CONCLUSION

For the reasons stated it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * *

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by re-

storing equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in

such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

[10] (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with

or without back pay, as will effectuate the policies of this Act.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restaining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

The relevant provisions of the National Labor Relations Act, as amended by Section 101 of the Labor Management Relations Act, 1947 (Act of June 23, 1947, c. 120, 61 Stat. 136, 29 U. S. C., Supp. I, 141, *et seq.*) are as follows:

* * * * *

[9] (f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular

and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor

organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

[SEC. 10] (c) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the

court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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